Supreme Court, U.S.
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In the

Supreme Court of the United States

JOHN PADBERG, CLIFFORD PAOLILLO and RASHID AHMED, individually and on behalf of all others similarly situated,

Petitioners,

v.

DIANE MCGRATH-MCKECHNIE, RUDOLPH W. GIULIANI, JOSEPH MCKAY, MATTHEW DAUS, HARRY RUBINSTEIN, ELLIOT SANDER, HARVEY GIANNOULIS, MARVIN GREENBERG, RAMONA M. WHALEY and NEW YORK CITY TAXI AND LIMOUSINE COMMISSION,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The New York City Taxi and Limousine Commission summarily suspended and later revoked the licenses of hundreds of taxi drivers. Each case followed a single violation of a rule against "service refusals." The taxi drivers contend that the maximum statutory penalty for such an offense is a $350 fine, that the suspension and revocation policies were not properly enacted, and that they were not authorized by law. The revocations, the drivers contend, deprived them of property without due process of law. The courts below refused to resolve whether the revocations were legal, but held that they were, even if illegal, not unconstitutional. The questions presented are:

(1) Does due process require that a civil penalty that causes the deprivation of a vital property right be within limits established by law?

(2) When a municipal agency revokes a valuable commercial license without lawful authority, but in pursuit of a deliberate policy, is a plaintiff required to demonstrate that the action was "outrageous," "conscience-shocking," "egregious," "irrational," or "arbitrary" — as well as illegal — in order to state a claim for relief under 42 U.S.C. § 1983?

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The Summary Order whose review is sought is published at 60 Fed.Appx. 861 (2d Cir., Mar. 13, 2003) and is reproduced in the Appendix at A-1a. The order denying the petition for rehearing is reproduced in the Appendix at A-82a. The District Court opinion is published at 203 F.Supp.2d 261 (E.D.N.Y. Apr 29, 2002) and is reproduced in the Appendix at A-4a.

JURISDICTION

The court of appeals entered its judgment on March 13, 2003. Petitioners filed a timely petition for rehearing on March 25, 2003, which was denied on April 23, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

U.S.C.A. Constitution. Amend. XIV, Section 1, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 in pertinent part provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

The New York City Charter, ch. 65, (1971) in pertinent part provides:

> § 2300: **Commission**. There shall be a New York city taxi and limousine commission the purpose of which shall be the continuance, further development and improvement of taxi and limousine commission service in the city of New York. It shall be the further purpose of the commission, consonant with the promotion and protection of the public comfort and convenience, to adopt and establish an overall public transportation policy governing taxi... service.
>
> § 2301. **Membership of the Commission**. a. The commission shall consist of nine members to be appointed by the mayor with advice and consent of the city council; five of said members, one resident from each of the five boroughs of New York city, shall be recommended for

appointment by a majority vote of the councilmen of the respective borough....

c. The mayor shall designate one member of the commission to act as chairman and chief executive officer. The chairman shall have charge of the organization and its office and have the authority to employ, assign, and superintend the duties of such officers as may be necessary to carry out the provisions of this chapter. The chairman shall devote his full time to this position and as such he shall receive compensation.

d. The other members of the commission shall not be entitled to compensation.

e. A majority of the whole number of the commission then in office shall constitute a quorum for the transaction of any business. The commission shall have power to act by a majority of its members.

§ 2303. **Jurisdiction, powers and duties of the commission.** a. The jurisdiction, powers and duties of the commission shall include the regulation and supervision of the business and industry of transportation:...

b. Such regulation and supervision shall extend to:...

5. The issuance, revocation, suspension of licenses for drivers, chauffeurs, owners or operators of vehicles, other than licenses

> issued pursuant to state law, and for taxicab brokers and the establishment of qualifying standards required for such licensees....

New York City Administrative Code § 19-507(a) (1989) provides:

> a. The commission shall fine any driver or suspend or revoke the driver's license of any driver, as provided in subdivision b of this section, who shall have been found in violation of any of the following:
>
> 1. No driver of a taxicab shall seek to ascertain, without justifiable grounds, the destination of a passenger before such passenger shall be seated in the vehicle.
>
> 2. No driver of a taxicab shall refuse, without justifiable grounds, to take any passenger or prospective passenger to any destination within the city....
>
> b. 1. Any driver who has been found to have been in violation of a provision of paragraph one, two, three, or four of subdivision a of this section, or any combination thereof shall be fined not less than two hundred dollars nor more than three hundred fifty dollars for the first offense. Any driver who has been found to have been in violation of such paragraphs or any combination thereof for a second time within a twenty-four month period shall be fined not less than three hundred fifty dollars nor more than five

> hundred dollars, and the commission may suspend the driver's license of such driver for a period not to exceed thirty days. The commission shall revoke the driver's license of any driver who has been found to have violated any of the provisions of paragraph one, two, three, or four of such subdivisions, or any combination thereof, three times within a thirty-six month period.

STATEMENT OF THE CASE

Petitioners are New York City taxi drivers who are among the hundreds whose commercial licenses were suspended without hearings and later revoked without lawful authority by the respondent New York City Taxi and Limousine Commission (the "TLC"). The TLC acted pursuant to a set of policies known as Operation Refusal. In addition to the TLC, respondents are the then TLC chairwoman, its chief legal officers, its commissioners, and the city's Mayor. This action was to declare the TLC's actions in violation of 42 U.S.C. § 1983, to gain return of the licenses, and for damages.

In order to operate a yellow taxi in the City of New York, a driver must have a valid taxi driver's license, also known as a hack license, which is issued by the TLC. The TLC, pursuant to the terms of the New York City Charter and the City Administrative Code, regulates the taxi industry. It is empowered to penalize drivers and other licensees, pursuant to city statute and its own regulations. Ever since the TLC was founded in 1971, the Administrative Code, enacted by the City Council, has barred drivers from "refus[ing] without justifiable

grounds, to take any passenger or prospective passenger to any destination within the city." N.Y.C. Admin. Code § 19-507(a) (1989).

The same statute, § 19-507(b), determines the penalty for violations. For the first offense, the penalty is a fine "not less than two hundred dollars or more than three hundred and fifty dollars." For the second offense within 24 months, the penalty is a fine of $350-to-$500 and a suspension "for a period not to exceed 30 days." For a third offense within 36 months, the penalty is revocation. The TLC's own regulations mirror this statutory scheme.

In November 1999, however, a protest by the movie star Danny Glover, who complained that cabbies regularly bypassed him because he is black, precipitated a new policy. After Glover's outcry gained national publicity, the TLC commenced a new policy, or set of policies, called "Operation Refusal." The "summary suspension policy" (as the district court called it) dictated that any driver suspected of even a single service refusal would have his license suspended on the spot and his taxicab would be confiscated "for safekeeping." The "revocation policy" dictated that, after a hearing, his license could be revoked *on the first offense*. Neither policy called for proof that the alleged service refusal was racially motivated.

Petitioners, including cabbies whose licenses were suspended or revoked, sued. On cross motions for summary judgment, the district court ruled on what it considered to be three distinct claims. First, it held that the summary suspension policy violated the Federal Constitution and granted summary judgment to petitioners. Second, it held that there was sufficient evidence to allow discovery on the claim that the TLC's

own administrative law judges were systemically biased. Third, it held that the revocation policy—while not necessarily legal—did not violate petitioners' civil rights. *Padberg v. McGrath-McKechnie*, 203 F.Supp.2d 261 (E.D.N.Y. Apr 29, 2002).

The district court did *not* determine that the TLC's actions were lawful. It held, rather, that the revocation policy was "arguably" within the agency's regulatory authority. Even if the penalties were illegal, the district court held, "Substantive due process standards are violated only by conduct that is so outrageously arbitrary as to constitute a gross abuse of governmental authority." (A-36a) Since the TLC's actions were not "conscience-shocking," "egregious," "arbitrary," or "outrageous," the district court granted summary judgment to respondents. (A-35-a-42a) Respondents did not appeal the district court ruling as to the summary suspension policy or as to the judicial bias claim.

After the district court entered final judgment (except as to the judicial bias claim) petitioners appealed as to the revocation policy. The Second Circuit affirmed by summary order. *Padberg v. McGrath-McKechnie*, 60 Fed. Appx. 861 (2d Cir., Mar. 13, 2003) (A-1a). Petitioners moved for a rehearing or a rehearing *en banc*. The Second Circuit denied the motion on April 23, 2003. (A-82a)

The writ should be granted because the lower courts' holdings contradict and fundamentally misconstrue this Court's decisions with respect to 42 U.S.C. § 1983, which, at bottom, are to protect persons wronged by the misuse of power possessed by virtue of state law. The decisions below also rely on dicta from this Court's "substantive due process" cases, applying it in way that disregards petitioners' well-established procedural

rights and the democratic process. Finally, by sanctioning illegal punishments, the decisions below permit a city agency to act in a lawless and draconian manner, depriving taxi drivers of their livelihoods, in spite of statutes written to protect them. Ever since *Monroe v. Pape*, 365 U.S. 167 (1961), Section 1983 has been read to provide a federal remedy for such conduct.

1. This action has its origins in November 1999 when Mr. Glover protested publicly that cabbies in New York tended to pass him by, thus refusing him, because he is black. With racial issues a flashpoint, Mr. Glover's protest received massive publicity in New York and made the news as far away as Australia and India. Though his complaint was longstanding—and no one denies it is legitimate and often true—the Mayor and the Chairwoman of the TLC reacted as never before.

The TLC announced a sting to ferret out drivers who refused service to passengers. On November 10, in addition to on-the-spot license suspensions, the Mayor warned cabbies through the newspapers, "We will take your car away from you." On the same day, the TLC issued a notice to drivers. The notice, headlined "ATTENTION Medallion Taxicab Drivers," was posted at TLC offices and at taxi garages around the city. It heralded the summary suspensions: "The driver's T.L.C. license will be confiscated and the taxicab will be removed to the nearest police precinct for safekeeping." It also alerted drivers to the penalties "if a driver is found guilty of violating [TLC] Rule 2-50(a) or (b)," the TLC rules barring service refusals. The penalties listed

were those in the governing statute, the Administrative Code § 19-507(b):

> 1ST Offense: $200- $350 fine;
> 2nd Offense within 24 Months:
> $350-$500 fine and possible
> suspension of up to 30 days;
> 3rd Offense with [sic] 36 Months:
> MANDATORY LICENSE
> REVOCATION

The next day, however, then TLC Chairwoman Diane McGrath-McKechnie sent a memorandum to "All Enforcement Personnel." Headed "Operation Refusal Enforcement Directive," the directive required TLC agents to issue *two* summonses in all Operation Refusal cases. The first summons was to be for refusal (TLC Rule 2-50(a) or (b)). The second was to be for violating TLC Rule 2-61(a) (2), which proscribes in part "any willful act of omission or commission which is against the best interests of the public." On February 18, 2000, the TLC's chief administrative law judge, Lisa Rana, issued a memorandum to all TLC administrative law judges: "Please be advised that, upon a finding of a refusal, *the Commission's policy requires that both the Rule 2-50B and the Rule 2-61A2 violations be sustained.*" (emphasis added). The violation of the latter rule, the TLC would later argue, justified license revocation.[1]

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[1] The full text of the TLC Rule 2-61, 35 RCNY § 2-61, speaks essentially to crimes committed by taxi drivers while on duty. The rule, captioned "Compliance With Law," states:

(a) (1) A driver, while performing his duties or responsibilities as a driver, shall not commit or attempt to commit, alone or in concert with another, any act of

Neither the memorandum to enforcement personnel nor the order to judges was made public. Neither decree was delivered to drivers. Indeed, publicly, the city and the TLC emphasized the summary suspension policy, since held unconstitutional. On November 14, for instance, the Mayor spoke to Operation Refusal in his weekly radio address: "I have directed the New York City Police Department and the Taxi and Limousine Commission to intensify their existing enforcement.... [A]nd when cabbies don't stop or otherwise refuse to do their job in compliance with the law, the officers will fine them, suspend their licenses, and take their cabs to a police precinct until it can be picked up." The summonses issued to the drivers, while instructing them what must be done to retrieve their automobiles, likewise said nothing of the possibility of license revocation. By the time the cases were tried, however, Ms. Rana's decree found its way into rulings by TLC judges. According to Ms. Rana, not a single TLC judge failed to sustain a TLC Rule 2-61A2 along with the TLC Rule 2-50B violation.

The chairwoman's decree, as the district court noted, was applied to all types of service refusals whether or not allegedly based on race. (A-33a) Although the policy was enforced in the name of the TLC, the full

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misrepresentation, fraud or larceny, against a passenger, Commission representative or public servant or any other person.

(a)(2) A driver, while performing his duties and responsibilities as a taxicab driver, shall not commit or attempt to commit, alone or in concert with another, any willful act of omission or commission which is against the best interests of the public, although not specifically mentioned in these Rules.

commission never approved it. The full commission was never even called to vote despite a New York City Charter provision, requiring the TLC to create policy "by a majority of its members." Indeed the commissioners other than the Chairwoman would, in time, explicitly reject the policy, albeit without any means to enforce their will.

2. The TLC charged two of the named plaintiffs in this action with violating the rule against service refusals. In both cases, the TLC confiscated the driver's cab and summarily suspended his license. (The cars were retrievable by their owners.) Mr. Ahmed, who was charged and suspended on December 2, 1999, appeared before a judge employed by the New York City Office of Administrative Trials and Hearings ("OATH"), a city agency that hears cases initiated by a variety of city offices. The OATH judge held that the statutory scheme did not permit revocation. "Prior decisions of this tribunal have concluded there is a mandatory penalty scheme divined by the City Council for violation of the refusal rules," the judge wrote. As this offense was Mr. Ahmed's first, and in the judge's view it was not racially motivated in any event, he recommended a fine of $300.00. The Chairwoman failed to act on the recommendation for seven months and, pursuant to a procedural rule, after this action was commenced, the license was reinstated.

This OATH opinion in Mr. Ahmed's case was consistent with a dozen similar rulings; there were no rulings to the contrary. The TLC Chairwoman knew about them and later appealed by letter to the Chief OATH Judge Rose L. Rubin for reconsideration of all 13. Judge Rubin denied the chairwoman's appeal, calling it "most unorthodox" and "misplaced." In response, as of January 1, 2000, the TLC altered its own rules so Operation Refusal cases

would be brought before the TLC's own judges. The independent OATH judges were removed from the process.

Mr. Padberg, who was charged and suspended on February 15, 2000, appeared before a TLC judge. As with all Operation Refusal cases, the testimony was by two TLC inspectors against the lone driver. The TLC judge found him guilty of a service refusal and, on the same facts, stated, "It is the policy of the Commission that a finding of a service refusal is sufficient to establish that the respondent acted against the best interests of the public." The TLC judge, therefore, recommended revocation to the chairwoman. She agreed and revoked Mr. Padberg's license.

Petitioners do not know how many cabbies Operation Refusal threw out of work. The record, however, indicates that by November 22, 2000, 254 drivers were issued summons and summarily suspended pursuant to its strictures. While the summary suspension policy has ended, the TLC says, it adheres to the revocation policy to this day. Each of the city's 41,000 cabbies, mostly immigrant, unorganized, and politically voiceless, suffers under the *in terrorem* effect of this regime.

3. Petitioners sued alleging that license suspensions without a hearing and revocations without statutory authority both constituted a denial of a valuable property right without due process of law. On November 6, 2000, petitioners moved for summary judgment, and on December 4, respondents cross-moved. With respect to the TLC's revocation policy—the only policy at issue here—petitioners made three central arguments. First, the TLC lacked authority to enact Operation Refusal because the full commission never voted on or approved the policy, despite a City

Charter requirement. Second, the TLC administrative law judges, who are hired on a per diem basis and have no tenure or job security of any kind, and who took orders from a chief judge who answered to the Chairwoman, were systemically biased in their rulings on Operation Refusal cases. Third, and most fundamentally, longstanding city statutes established the mandatory penalties applying to service refusals. These statutes, and the TLC regulations which followed, clearly state that the penalty for a first refusal offense is a monetary fine and not license revocation (which could only be ordered on a third offense within 36 months). In short, the TLC's new policy was illegal.

Petitioners pointed out that OATH judges, shortly after Operation Refusal was announced, issued a dozen or more decisions holding that the revocation policy violated clear City law. As one OATH judge put it: "[D]espite the legitimate policy interests advanced by [the TLC]...the penalties for service refusals are set by law.... Section 19-507 (b) of the Administrative Code is a particular legal provision and controls here. It does not permit license revocation for a first-time refusal offense." *Taxi and Limousine Commission v. Park*, Oath Index No. 1014/00 (Feb. 2, 2000). (These decisions, however, were non-binding recommendations to the TLC chairwoman, who was free to reject or modify them.) Before the Second Circuit ruled, a state trial court and a small claims court reached the same conclusion as the OATH courts. *Matter of Arif v. New York City Taxi and Limousine Commission*, 2002 WL 1559732 (N.Y.Co. 2002); *Pierre-Lys v. New York City Taxi and Limousine Comm'n*, 2002 WL 338187 (N.Y.C. Civ. Ct. 2002).

On April 29, 2002, the district court denied petitioners' motion and granted the cross motion. It held that

suspending a license on a mere allegation without a hearing of any kind violated the Due Process Clause. It further held that there was sufficient evidence that TLC administrative judges were systemically biased to permit discovery.

As to the revocation policy, the district court determined, *sua sponte*, that "plaintiffs'... arguments advance substantive due process claims as opposed to procedural due process claims."[2] In a decision remarkable for its near complete reliance on a label, it held: "[T]he protections of substantive due process are limited to government action that is 'arbitrary, conscience-shocking, or oppressive in a constitutional sense, *but not against government action that is incorrect or ill-advised.*'" quoting *Lowrance v. Achtyl*, 20 F.3d 529, 537 (2d Cir. 1994) (adding emphasis and omitting quotation marks and citations) (A-35a). It rejected petitioners' claims that the revocation policy was void as it was not enacted by a majority of the TLC, as the Charter requires, because, "[the chairwoman's] action, even if unauthorized by the Charter, cannot be considered a 'gross abuse' of her power rising to the level of a constitutional violation." (A-36a)

On the claim that the penalty imposed exceeded that authorized by law, the district court again invoked substantive due process. It held: "Regardless of whether plaintiffs or defendants are correct in their interpretation of the law, plaintiffs' argument that

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[2] No party to this action had mentioned "substantive due process" in its moving papers and the term was never mentioned during any of the four lengthy oral arguments in this action. Nor did the district court mention the concept in a 28-page earlier decision on petitioners' motion for a preliminary injunction. *See Padberg v. McGrath-McKechnie*, 108 F.Supp.2d 177 (E.D.N.Y. 2000)

defendants violated substantive due process by suspending and revoking their licenses for a first or second service refusal offense is unavailing. As previously explained, substantive due process does not protect against government action that is merely 'incorrect or ill-advised.'" citing *Lowrance*, 20 F.3d at 537 (A-37a).

The district court rested its ruling in part on the asserted good faith of the respondents: "Moreover, there is nothing to suggest that Chairperson McGrath-McKechnie or Mayor Giuliani were prompted to act by anything but legitimate motives ... [in] pursuit of an otherwise legitimate government objective." The district court added its view— unsupported by testimony or affidavits— that "[d]efendants were acting pursuant to authority that they believed they possessed in order to further the legitimate interest of eliminating racial discrimination among taxicab drivers." (A-42a)

In response to petitioners' motion, the district court entered a final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, and petitioners appealed. The Second Circuit affirmed by summary order. It held: "Because a reasonable, though arguably incorrect, interpretation of the city regulations supports the Chairwoman's actions, these actions were not 'arbitrary or irrational' and therefore do not give rise to a constitutional violation." citing *Interport Pilots Agency, Inc. v. Sammis*, 14 F.3d 133, 145 (2d Cir.1994) (A-3a). Thus, neither the district court nor the Second Circuit ruled on whether or not the TLC policy was, put simply, against the law. While the district court mentioned the OATH and state court decisions in passing, the Second Circuit ignored them altogether and neither mentioned the statements by the TLC commissioners.

Petitioners moved for a rehearing on the grounds that the Second Circuit ruled on the basis of TLC regulations, not the statutes, which supersede them, and because it had never before applied substantive due process theory to express municipal policy as distinct from sporadic or unauthorized conduct. On April 23, 2003, the Second Circuit denied the petition. (A-82a)

4. This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

The decisions below labeling petitioners' claim "substantive due process" note that this Court has been wary of "expand[ing] the concept" and conclude that the concept should only apply to government action that is "'arbitrary, conscience-shocking, or oppressive in a constitutional sense, *but not against government action that is incorrect or ill-advised.*" *Lowrance v. Achtyl*, 20 F.3d 529, 537 (2d Cir. 1994) (emphasis added). Leaving aside whether deliberately illegal conduct might be arbitrary, even shocking, substantive due process is the wrong term, and it led the lower courts in the wrong direction. Misbranding the claim, the decisions below conflict fundamentally with holdings of this Court in Section 1983 cases since *Monell v. New York City Dep't of Soc. Services*, 436 U.S. 658 (1978). Even more basic, the decisions below ignore core constitutional principles of notice and due process reiterated by this Court as recently as last term in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. __, 123 S.Ct. 1513 (2003).

I. The Decisions Below Misunderstand Due Process, Which Requires Notice, Adherence to Law, and Faithfulness To the Democratic Process.

Despite the district court's appellation, petitioners' claims are, in fact, procedural. Due process of law requires notice, a fair hearing, an unbiased tribunal, and a penalty (if any) that is sanctioned by law. If, for example, a state judge were to impose a ten-year sentence for possession of marijuana where the maximum sentence is five years, no one would be heard to wonder whether the added penalty was egregious or outrageous. No one would claim that the additional five-year punishment was "merely ill-advised" or that it could be justified by the judge's sincere belief that he was doing right. The penalty would be unauthorized and thus it would violate both state law and the Constitution. *Apprendi v. New Jersey*, 530 U.S. 466, 481 (2000) ("We have often noted that judges in this country have long exercised discretion of this nature in imposing sentence *within statutory limits* in the individual case.") That a punishment fixed by statute cannot be exceeded is fundamental. *See, e.g., Williams v. New York, 337 U.S. 241, 246,* (1949) (emphasizing that sentencing judges may have discretion "within limits fixed by law.")

In this case, petitioners had a property right to their licenses, long established by state law. *Bell v. Burson*, 402 U.S. 535, 539 (1971); *Hecht v. Monaghan*, 307 N.Y. 461 (1954). The issue is whether the punishment was authorized, not whether the government has the power to define the misconduct in the first place. The claim relates to whether petitioners were on notice that a single service refusal might lead to revocation. It also relates to whether the policy applied was validly

enacted. Such concerns have long been considered governed by the due process clause. *See Bouie v. City of Columbia*, 378 U.S. 347 (1964) (retroactive application of new construction of statute violated due process); *Lankford v. Idaho*, 500 U.S. 110 (1991) (due process violated where defendant and his counsel did not have adequate notice that judge might impose death sentence).

The strict constitutional safeguards afforded to criminal defendants may not apply in civil cases. But the basic protection against "judgments without notice" afforded by the Due Process Clause is implicated by civil penalties as well. *See Shaffer v. Heitner*, 433 U.S. 186, 217 (1977) (Stevens, J., concurring in judgment). The district court held, of course, that the taxi drivers were entitled to a pre-suspension hearing. But the Due Process Clause also speaks to the ultimate penalty. As Justice Stevens wrote in *BMW of North America, Inc. v. Gore*, "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." 517 U.S. 559, __ (1996). Last term, this Court reiterated that "there are procedural and substantive constitutional limitations on [punitive damage] awards" on large corporations. *State Farm*, 123 S.Ct. at 1519. The same should hold true for penalties applied the taxi drivers. Here, however, there was no notice. Indeed there was contrary notice as the TLC's flyer heralding Operation Refusal specifically stated the penalty for refusals—that is, a $200-$350 fine for the first offense.

Beyond the lack of notice, Operation Refusal policy was never validly enacted. It is undisputed that the full TLC (which had seven active commissioners serving

staggered seven year terms including the chairwoman, who acts as the chief executive) never voted. This failure violated The City Charter § 2301(e), which gives the TLC jurisdiction over taxi policy, but permits its exercise only "by a majority of its members." Even if they do not relate to individual hearings these aspects of the claim are procedural in every sense.

Indeed, when Operation Refusal cases came before the full commission on July 25, 2000, the commissioners firmly rejected the chairwoman's edict. In case after case, the commissioners rejected appeals by TLC lawyers to revoke and accepted the cabbies' arguments that TLC rules do not authorize revocation for a first refusal offense. In most cases, the Chairwoman cast the sole vote for revocation.[3] (The only exception was a case where the cabbie did not appear to contest the charges.) Commissioner Elias Arout summarized the tenor of the hearings:

> Now it clearly states in language—section 19-507(b) is clear and unambiguous. There is a mandatory monetary penalty for 200 to $350 for the first offense, mandatory monetary penalty for 350 to $500, and a discretionary suspension up to 30 days for the second offense, and a mandatory license revocation for three or more incidents as a refusal within 36 months.... Clearly, had the City Council wished to provide the license revocation for the first instance of refusal it would have done so.

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[3] At the end of the hearings, the Chairwoman derided her colleagues for following the law and castigated them for failing to equal her newfound commitment to fighting discrimination: "And clearly today, I am very—I'm not going to use something like 'upset.' I'm just disappointed...."

The commissioners, like the OATH judges, would have enforced the penalty that the TLC itself put in its November 10, 1999 notice to drivers, which is to say the penalty designated by the governing statute and TLC regulations. But the commissioners, again like the OATH judges, had no effective enforcement power. (Apart from the Chairwoman, the commissioners are unpaid and have no offices at the TLC headquarters in Manhattan.) The chairwoman bypassed them as well, as the vast majority of revocation orders were made absent the commissioners in "executive session." *See Arif v. New York City Taxi and Limousine Commission*, 2002 WL 1559732 (N.Y.Co. 2002) (holding Operation Refusal policies illegal under state law). Thus opinions of ALJs and TLC commissioners—later joined by state trial court judges— carried no more weight than the plain language of the statute.

Respondents, of course, insisted below that the chairwoman acting alone had authority through her power to superintend the TLC. The courts below did not resolve the issue, and held instead that arguable authority was enough—though the penalty scheme is really so clear that it's hardly arguable. This Court would not necessarily have to construe the state law, either. But the Due Process Clause does demand that a law be validly enacted in advance of the taking of a license that is crucial to a livelihood. *See I.N.S. v. Chadha*, 462 U.S. 919 (1983) (deportation order reversed where it was caused by a legislative veto). Failure to vote on a policy when a vote is required can hardly be consistent with due process of law. It is more than "incorrect" or "ill advised;" it is a fundamental thwarting of the democratic process. If respondents' considered, deliberate actions were illegal—even if arguably not "egregious"— this Court should at least consider

whether that deliberate, illegal conduct by a municipal agency is inconsistent with due process.

II. Where A Plaintiff's Right Is Taken By Virtue of An Explicit Municipal Policy, Nothing In This Court's Due Process Jurisprudence Requires Him To Demonstrate That The Policy Shocked the Conscience.

Ever since *Monroe v. Pape*, 365 U.S. 167 (1961), there has been a universal consensus that Section 1983 restricts state *policies* that deprive persons of life, liberty or property. Even Justice Frankfurter, who dissented in *Monroe*, would have held for the plaintiff if the conduct in question had been "authorized by state law" or was "the custom or usage of the Police Department," rather than the illegal action of individual police officers. *See Monroe*, 365 U.S. at 258. (Frankfurter, J. dissenting). In *Monell v. New York City Dep't of Soc. Services*, 436 U.S. 658 (1978), this Court, overruling *Monroe* in part, held that cities and city agencies could be liable under Section 1983, when explicit policy or custom that is tantamount to policy inflicts the injury." 436 U.S. at 694. Since *Monell*, much of the debate in construing Section 1983 has been about what customs or practices could be considered policy. Where a policy is at issue, moreover, this Court has held that municipalities, unlike individual actors, could not claim qualified immunity in defense to a Section 1983 claim. *Owen v. City of Independence*, 445 U.S. 622, 638 (1980)

There is no dispute that a municipal policy is at issue here, or that it caused a taking. While the decisions below are not crystal clear, they appear to hinge on

whether a constitutional wrong has been done, which, as this Court has held, is a separate question. *County of Sacramento v. Lewis*, 523 U.S. 833, 856 (Kennedy, J. concurring) (1998); *Collins v. City of Harker Heights*, 503 U.S. 115, 120 (1992). The decisions below apply this Court's substantive due process analysis, but in a way that is wholly foreign to this Court's cases. For this Court has never invoked substantive due process where a considered policy is involved, but only where the cases involved random and unauthorized acts by particular officials.

Lewis, for instance, involved a high-speed police chase that resulted in the death of a motorcycle passenger. Justice Souter described the inquiry as whether there was "an abuse of executive power so clearly unjustified by any legitimate objective of law enforcement as to be barred by the Fourteenth Amendment." 523 U.S. at 840 (citations omitted). The Court held that in the context of a high-speed chase, "only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation." *Id.* at 836. The action was inadvertent and, at worst, negligent. Had there been a deliberate policy of killing bystanders, or even instigators of police chases, surely the result would have been different.

This Court was careful to point out that what shocks the conscience in one case might not be sufficient in another. In his dissent, Justice Scalia criticized the test as too subjective, and said the test should be "whether our Nation has traditionally protected the right" asserted. *Id.* at 862. Both tests have the same design: to prevent undue expansion of the concept of due process. Still, the core idea of due process is "'to secure the individual from the arbitrary exercise of the powers of

government, unrestrained by the established principles of private right and distributive justice.'" *Hurtado v. California*, 110 U.S. 516, 527 (1884) (quoting *Bank of Columbia v. Okely*, 17 U.S. 235, 4 Wheat. 235-244, 4 L.Ed. 559 (1819) (Johnson, J.)).

Where the deliberate, illegal actions of a municipal agency effect the taking of a vital right, that defines an "arbitrary exercise of the powers of government." The cabbies' private rights, long established by statute, proved no restraint on the TLC or its chairwoman. Instead of looking to the statute, the courts below looked to their own views of what was outrageous or conscience shocking. It is generally the case that illegal actions by the state are normally considered arbitrary (or just as bad).

For the courts below to rely on "a reasonable, though arguably incorrect, interpretation of the city regulations" ignores a fundamental concept of administrative law that illegal actions, no less than arbitrary ones, should be set aside. *See F.C.C. v. NextWave Personal Communications Inc.*, __ U.S. __, 123 S.Ct. 832 (2003) (Scalia, J.) "The Administrative Procedure Act requires federal courts to set aside federal agency action that is 'not in accordance with law,' — which means, of course, any law, and not merely those laws that the agency itself is charged with administering.") (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413-414 (1971)). As Justice Rehnquist said in *Securities and Exchange Comm'n v. Sloan*, "[T]he power to summarily suspend trading in a security even for 10 days ... is an awesome power with a potentially devastating impact..... A clear mandate from Congress ... is necessary to confer this power." 436 U.S. 103, 112 (1978). The same clear mandate should be necessary to revoke a humble taxi driver's license, for it is essential

to his trade. *See also Chadha*, 462 U.S. at 944 ("[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.")

"Historically, th[e] guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property." *Lewis*, 523 U.S. at 863 (Scalia, J. dissenting) (citing *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (citations omitted) and *Collins*, 503 U.S at 127, n. 10). Thus it is not surprising that this Court has rejected due process arguments in the context of high-speed police chases (*Lewis*), alleged failures to provide safety in the workplace (*Collins*), allegedly inadequate police training (*Canton v. Harris*, 489 U.S. 378 (1989)), and prison riots (*Whitley v. Albers*, 475 U.S. 312 (1986)). In those cases, and others, this Court was "reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins*, 503 U.S. at 125. But here the guideposts are fixed and certain.

This case is not a chase; it is not a riot; there are no split-second judgments demanding deference. Just the opposite, respondents' actions were cool and calculated. If they were nonetheless illegal, respondents should be liable. The district court credits the Chairwoman and the Mayor with "legitimate motives." This conclusion is akin to a granting the good faith defense that *Owen* precludes. There was, in any event, no basis for this factual finding: no deposition testimony, no affidavits, no documentary evidence of any kind—and no discovery. Respondents' motives were hotly contested in the pleadings, and they are contested still.

Circumstances suggest that respondents were motivated at least as much by electoral politics as anything else.[4]

Even if their motives were pure, respondents' revocation policy was unlawful nonetheless. When 13 OATH rulings held unanimously that it was illegal, they would not relent. When the TLC commissioners, rejected the policy, they did not cease. Set on an illegal course, they stuck to it.

The central aim of the Civil Rights Act was to provide protection to those persons wronged by the "'[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *Monroe*, 365 U.S. at 184 (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)). The TLC, clothed with authority, destroyed a wide swath of property rights and livelihoods by the hundreds. These "arbitrary action[s] of government" (*See Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)) are precisely the kind that the Due Process Clause should prevent.

CONCLUSION

Danny Glover's protest quite properly struck a nerve, and certainly it unleashed a firestorm of publicity. But neither the legitimacy of his complaint, nor the allegedly heartfelt desire to cure it justified the systemic trampling of the constitutional rights of taxi drivers, as occurred here. The TLC and its top official defied their city's charter, enabling statutes, their own regulations,

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[4] The New York Daily News noted in its coverage of Operation Refusal, "[Mayor] Giuliani is preparing to launch his candidacy for U.S. Senate, and the plan could help him pick up support in the black community, where polls show he is widely unpopular." The Daily News Nov. 11, 1999.

independent judges, and their own commissioners. In their zeal, they deprived hundreds of other taxi drivers of their livelihoods. As this Court has said, "Whatever other concerns should shape a particular official's actions, certainly one of them should be the constitutional rights of individuals who will be affected by his actions." *Owen*, 445 U.S. at 656. When officials ignore this injunction, Section 1983 is there to provide a remedy.

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,
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(Any footnotes trail end of each document)

No. 02-7903
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOHN PADBERG, CLIFFORD PAOLILLO and RASHID AHMED, individually and on behalf of all others similarly situated,
Plaintiffs-Appellants,

v.

DIANE MCGRATH-MCKECHNIE, RUDOLPH W. GIULIANI, JOSEPH MCKAY, MATTHEW DAUS, HARRY RUBINSTEIN, ELLIOT SANDER, HARVEY GIANNOULIS, MARVIN GREENBERG, RAMONA M. WHALEY and NEW YORK CITY TAXI AND LIMOUSINE COMMISSION,
Defendants-Appellees.

March 13, 2003, Decided

COUNSEL: Appearing for Appellants: DANIEL L. ACKMAN, New York, NY.

Appearing for Appellees: SCOTT SHORR, Office of the Corporation Counsel of the City of New York (Michael A. Cardozo, Corporation Counsel; Barry P. Schwartz, of counsel), New York, NY.

JUDGES: PRESENT: HON. RICHARD J. CARDAMONE, HON. ROBERT D. SACK, Circuit Judges, HON. WILLIAM H. PAULEY III, n1 District Judge.

OPINION: SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be, and it hereby is, AFFIRMED.

Because the underlying facts of this case are set forth in detail in the opinion of the district court, Padberg v. McGrath-McKechnie, 203 F. Supp. 2d 261 (E.D.N.Y. 2002), we recount only those facts that are necessary to understand the disposition of this appeal. Since 1999, the defendants have implemented a suspension and revocation policy, according to which first and second time service refusals by New York City taxi drivers are punished with license suspension or revocation, following a hearing. Id. at 269. The plaintiffs filed suit against the defendants pursuant to 42 U.S.C. § 1983, alleging, inter alia, that this policy unconstitutionally deprived them of their property. The district court granted the defendants' motion for summary judgment with respect to the suspension and revocation policy. Id. at 290. n2 The plaintiffs appeal. For the reasons given below we conclude that the district court was correct.

The plaintiffs argue that the suspension and revocation policy violates city regulations which mandate fines, not suspension or revocation, as penalties for first and second time service refusals. Admin. Code § 19-507(b)(1). We agree with the district court that the city regulations can reasonably be read to permit the imposition of license suspension or revocation "in the alternative to any of the specific penalties set forth." 35 R.C.N.Y. § 8-03(b). The plaintiffs further argue that Chairwoman Diane McGrath-McKechnie lacked the authority to implement the policy without the approval of a majority of the Commission. N.Y.C. Charter § 2301(e). We agree with the district court that the city charter can reasonably be read to grant the Chairwoman

power to carry out the regulations on her own. N.Y.C. Charter § 2301(c). Because a reasonable, though arguably incorrect, interpretation of the city regulations supports the Chairwoman's actions, these actions were not "arbitrary or irrational" and therefore do not give rise to a constitutional violation. Interport Pilots Agency, Inc. v. Sammis, 14 F.3d 133, 145 (2d Cir. 1994).

The plaintiffs further argue that one of the defendants' alleged statutory bases for the policy is unconstitutionally vague. 35 R.C.N.Y. § 2-61(a)(2) prohibits taxi drivers from committing any act "which is against the best interests of the public." Considering "the particular application" of the regulation, as we must in evaluating this vagueness challenge, 1United States v. Coonan, 938 F.2d 1553, 1562 (2d Cir. 1991), we conclude that in light of 35 R.C.N.Y. § 2-50(b), which prohibits taxi drivers from unjustifiedly refusing service, the plaintiffs had "fair notice of [the] conduct proscribed . . . by the regulation," Giano v. Senkowski, 54 F.3d 1050, 1057 (2d Cir. 1995). The regulation as applied therefore survives the vagueness challenge.

For the foregoing reasons, the judgment of the district court is hereby AFFIRMED.

FOOTNOTES

n1 of the United States District Court for the Southern District of New York, sitting by designation.

n2 The district court also granted the plaintiffs' motion for summary judgment with respect to their challenge of the defendants' summary suspension policy, pursuant to which the defendants would suspend licenses without a prior hearing. Id. at 282. This aspect of the district court's decision has not been appealed.

00 CV 3355, 00 CV 4117

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

JOHN PADBERG, CLIFFORD PAOLILLO and RASHID AHMED, individually and on behalf of all others similarly situated,
Plaintiffs,

against

DIANE MCGRATH-MCKECHNIE, RUDOLPH W. GIULIANI, JOSEPH MCKAY, MATTHEW DAUS, HARRY RUBINSTEIN, ELLIOT SANDER, HARVEY GIANNOULIS, MARVIN GREENBERG, RAMONA WHALEY and THE NEW YORK CITY TAXI AND LIMOUSINE COMMISSION,
Defendants.

ABID BAIG, MOHAMMED KHAN, KHALID MAHMOOD, MULUGHETA SULTAN, and the NEW YORK TAXI WORKERS ALLIANCE,
Plaintiffs,

against

RUDOLPH W. GIULIANI, Mayor of The City of New York, NEW YORK CITY TAXI AND LIMOUSINE COMMISSION, and DIANE MCGRATH-MCKECHNIE, Commissioner/Chairperson of the Taxi and Limousine Commission, Defendants.

April 26, 2002, Decided

COUNSEL:

For Padberg, Plaintiffs: Daniel L. Ackman, Esq., New York, N.Y.

For Padberg, Plaintiffs: Brad E. Mazarin, Esq., Block & Mazarin, New York, N.Y.

For Baig, Plaintiffs: Chaumtoli Huq, Esq., Kenneth Kimerling, Esq., Asian American Legal Defense and Education Fund, New York, N.Y.

For Defendants: Jerald Horowitz, Esq , Michael D. Hess, Esq., Gabriel Taussig, Esq., Deborah Rand, Esq., Corporation Counsel of the City of New York, New York, N.Y.

JUDGES:
RAYMOND J. DEARIE, United States District Judge.

OPINIONBY:
RAYMOND J. DEARIE

OPINION:

MEMORANDUM & ORDER

DEARIE, District Judge.
Plaintiffs in the above-captioned cases commenced these actions pursuant to 42 U.S.C. § 1983 to challenge "Operation Refusal," an initiative started in 1999 by the New York City Taxi and Limousine Commission ("TLC" or "Commission"), former Mayor Rudolph Giuliani and Diane McGrath-McKechnie, the Chairperson of the TLC, to increase disciplinary action against taxicab drivers who refuse service on impermissible grounds. Specifically, plaintiffs challenge two policies of Operation Refusal cla[illegible]ing they violated their due process rights under the Fourteenth Amendment. The

first practice is the summary suspension of taxicab licenses upon a charge of an unjustified service refusal. The second practice is the suspension or revocation of taxicab licenses, after a hearing, for first and second service refusal offenses. The individual plaintiffs in Padberg v. McGrath-McKechnie ("Padberg plaintiffs") and Baig v. Guiliani ("Baig plaintiffs") are taxicab drivers whose licenses were summarily suspended pursuant to the first practice and who faced suspension or revocation of their licenses pursuant to the second policy. The Baig plaintiffs also include the New York Taxi Workers Alliance ("NYTWA"), a membership organization devoted to preserving the rights of taxi drivers and improving working conditions for taxi drivers in New York City.

This Court previously denied the Padberg plaintiffs' motion for a preliminary injunction when they sought to enjoin the TLC from suspending or revoking licenses pursuant to the challenged practices, and to have the TLC return those licenses already suspended or revoked pursuant to the challenged practices. See Padberg v. McGrath-McKechnie, 108 F. Supp. 2d 177, 190 (E.D.N.Y. 2000). The Baig plaintiffs subsequently commenced a separate § 1983 suit to challenge the very same conduct, asking the Court for a preliminary injunction enjoining the challenged TLC practices and seeking the return of licenses suspended or revoked pursuant to those policies. The Padberg plaintiffs then moved for summary judgment. The Baig plaintiffs joined that motion. Presently before the Court are the Padberg and Baig plaintiffs' joint motion for summary judgment, defendants' cross-motion for summary judgment and the Baig plaintiffs' motion for a preliminary injunction. For the following reasons, plaintiffs' motion for summary judgment is granted in part and denied in part, defendants' cross-motion for summary judgment is

granted in part and denied in part and the Baig plaintiffs' motion for a preliminary injunction is granted in part and denied in part.

BACKGROUND

This case focuses on the fallout from Operation Refusal – a widely publicized TLC initiative to combat racial bias among taxicab drivers in New York City. Since the inception of Operation Refusal in November 1999, the TLC has summarily suspended and revoked the licenses of several taxicab drivers accused of refusing service. All individual plaintiffs are taxicab drivers who have been disciplined under the policies of Operation Refusal, which they now challenge on several grounds.

A. Statutory and Regulatory Framework

The TLC possesses the authority to promulgate rules and regulations and to set standards of conduct within the taxi and limousine industry. New York City, N.Y., Charter ch. 65, § 2300 (1971) ("N.Y. C. Charter § "). The TLC is comprised of nine members, one of whom is appointed by the Mayor to act as chairperson. N.Y.C. Charter § 2301(a) & (c). The purpose of the TLC is to develop and improve taxi and limousine service by adopting and establishing overall policy, and by establishing criteria and standards for driver safety, service, equipment safety and design, and conduct. N.Y.C Charter § 2300. The Commission has the power and duty to regulate and supervise the vehicle for hire industry, including the issuance, revocation, and suspension of licenses of drivers, in order to ensure that the established standards and rules of conduct and service are followed. N.Y.C Charter § 2303(b)(5). Exercising this authority, the TLC promulgates Taxi and Limousine Commission Rules ("TLC Rules"). N.Y.C.

Charter § 2303(b)(11) to further these purposes. At issue in this case are, inter alia, TLC Rules specifying prohibited conduct for taxicab drivers, see, e.g., New York City, N.Y., Rules tit. 35, § 2-50 ("35-RCNY § ") (prohibiting unjustified service refusals and specifying what constitutes a justified service refusal), the penalties drivers face for violations of such conduct rules, see, e.g., 35 RCNY § 2-87 (specifying certain mandatory penalties for unjustified service refusals), and the procedures used to prosecute these offenders, see, e.g., 35 RCNY § 8-16 (outlining procedures for summary suspension of a driver's license).

B. Prohibited Conduct and Penalties

Both the Administrative Code of the City of New York ("Administrative Code" or "Code") and the TLC Rules prohibit unjustified service refusals. New York City, N.Y., Admin. Code § 19-507(a) (1989) ("Admin. Code § "); 35 RCNY § 2-50. Service refusals refer to those instances where, by words or actions, drivers refuse service to a potential passenger. The prohibition on service refusals found in the Administrative Code does not define an "unjustified" service refusal, but § 2-50(e) of the TLC Rules fills this gap by providing eleven justifications for a service refusal. n1

Both the Administrative Code and the TLC Rules provide "mandatory penalties" for service refusals. Admin. Code § 19-507; 35 RCNY § 2-87. Section 19-507(a) states that the TLC "shall fine any driver or suspend or revoke the driver's license of any driver, as provided in subdivision b of this section, who shall have been found in violation of [the prohibition against unjustified service refusals]." Admin. Code § 19-507(a). Section 19-507(b) specifies the penalties for one or more service refusals. Admin. Code § 19-507(b). For a first

service refusal offense, a driver "shall be fined not less than two hundred dollars nor more than three hundred fifty dollars." Id. For a second offense within a twenty-four month period the driver "shall be fined not less than three hundred fifty dollars nor more than five hundred dollars, and the commission may suspend the driver's license of such driver for a period not to exceed thirty days." Id. Finally, for a third offense within a thirty-six month period, "the commission shall revoke the driver's license." Id.

Section 2-87 of the TLC Rules specifies the same penalties as § 19-507 of the Administrative Code. See 35 RCNY § 2-87(a)(1). Unlike § 19-507, however, § 2-87 states that "nothing contained herein shall limit or restrict any other authority the Commission may have to suspend or revoke a driver's license." Id. Similarly, § 2-88 of the TLC Rules states that, "violation of any of these rules [including § 2-50(b) regarding service refusals] may also lead to revocation or suspension of a taxicab driver's license and/or fines in excess of those set forth in the above § § 2-86 and 2-87." 35 RCNY § 2-88. Section 19-507 of the Administrative Code does not contain any reference to a general authority given to the TLC to suspend or revoke driver's licenses. Nevertheless, in the same year that § 19-507 was enacted, the City Council also enacted § 19-505(1), which provides that "the Commission may, after a hearing, suspend or revoke any driver's license . . . for failure to comply with the commission's rules and regulations." Admin. Code § 19-505(a).

C. Operation Refusal

In November 1999, at the direction of Mayor Giuliani and Chairperson McGrath-McKechnie, the TLC instituted a heightened enforcement campaign targeting

the long-standing problem of unjustified service refusals. This new policy, referred to as "Operation Refusal," followed the highly publicized service refusal complaint filed by the actor Danny Glover. Operation Refusal involved the adoption of two new policies. First, TLC Officers were required to summarily suspend the license of a driver charged with an unjustified service refusal ("summary suspension policy"). Second, due to the classification of service refusals as conduct against the public interest, drivers were subject to the penalties of suspension or revocation for first and second service refusal offenses ("suspension and revocation policy").

Operation Refusal grew out of a number of events in 1999. On May 26, 1999, a few months prior to the inception of Operation Refusal, the City Council enacted Local Law 20, which contained several amendments to Title 19 of the Administrative Code. One such amendment was the addition of § 19-512.1 to the Administrative Code, which provides that, "the commission may, for good cause shown relating to a threat to the public health, or safety and prior to giving notice and an opportunity for a hearing, suspend a taxicab or for-hire vehicle license . . . and, after notice and an opportunity for a hearing, suspend or revoke such a license." Admin. Code § 19-512.1.

After Mr. Glover filed his complaint, Operation Refusal soon followed. In an Enforcement Directive, dated November 11, 1999, TLC Chairperson Diane McGrath-McKechnie announced that unjustified service refusals constitute a threat to the public interest in violation of both § 2-50 (prohibiting service refusals) and § 2-61(a)(2) (prohibiting conduct against the public interest) of the TLC Rules. n2 See "Operation Refusal Enforcement Directive," Decl. of Jerald Horowitz, Ex. A ("Horowitz Decl. "). TLC Officers, upon observing an

alleged service refusal, were instructed to issue summonses to the drivers for violations of both § 2-50 and § 2-61(a)(2). See id. TLC officers were further directed to summarily suspend and confiscate their taxicab licenses. See id. The TLC also began seeking penalties of suspension and revocation for first and second service refusal offenses pursuant to the penalty provisions of § 2-61(a)(2). See 35 RCNY § 2-86 (providing for discretionary suspension or revocation for violations of § 2-61(a)(2)). These penalties exceeded those previously applied in service refusal cases. On November 14, 1999, Mayor Giuliani followed up the Enforcement Directive by making the following announcement in his weekly radio address:

I have directed the New York City Police Department and Taxi and Limousine Commission to intensify their existing enforcement, particularly focusing on situations of cab drivers who refuse to pick up minority passengers or refuse to take any passenger to their destination. The idea is to send out additional undercover officers to hail cabs – and when cabbies don't stop or otherwise refuse to do their job in compliance with the law, the officers will fine them, suspend their licenses, and take their cabs to a police precinct until it can be picked up.

Rudolph W. Giuliani, Prohibiting Discrimination by Taxi Drivers (WINS radio broadcast, Nov. 14, 1999), Decl. of Daniel L. Ackman, Ex. 2.

On December 1, 1999, the TLC adopted § 8-16, which sets out the procedures to be applied when summarily suspending a drivers license. At the time of the summary suspension, TLC Officers must provide the driver with written notice of the summary suspension and of the availability of a summary suspension hearing. 35 RCNY

§ 8-16(c). n3 TLC Officers provide the driver with the following form notice:

You may request a hearing with respect to the continuation of this suspension by contacting the Commission . . . . This hearing will be scheduled within five (5) business days. At any such hearing you have the right to legal representation and to present evidence and witnesses on your behalf with respect to the issue of suspension. Your hearing on the charges will be held at the date and time indicated on the summons you received.

Horowitz Decl., Ex. B. The summary suspension hearing is held before a TLC ALJ, who "shall consider relevant evidence and testimony under oath." 35 RCNY § 8-16(d). As conceded by defendants at the June 29, 2000 oral argument, the scope of this hearing is limited to the summary suspension and consists of an examination of the driver's prior violations record and of the summons to insure it was properly issued. Tr. of Oral Argument at 16. The hearing does not provide an opportunity for the driver to present evidence challenging the underlying charge of service refusal upon which the summary suspension is based. The ALJ reviews the charges and, if the ALJ finds the summons includes violations of § 2-50 and § 2-61(a)(2), the summary suspension is upheld. The ALJ then issues a recommendation to the Chairperson to continue or discontinue the summary suspension, which the Chairperson may accept, reject or modify. 35 RCNY § 8-16(e).

The Chairperson's decision is the final decision of the Commission with respect to summary suspension. Id. If the Chairperson fails to render a decision on the summary suspension within sixty days of the conclusion of the suspension hearing, the suspension is stayed until

a decision is made on the summary suspension. 35 RCNY § 8-16(f). This stay remains in place only until the Chairperson makes a decision as to whether to continue the summary suspension. Thus, if the Chairperson upholds the summary suspension, the TLC Rules do not indicate how long the driver must wait before being given a full hearing on the merits. No provision of § 8-16, or any other TLC Rule, requires a stay of the summary suspension pending a decision on the merits of the service refusal charges.

At the same time as the TLC introduced its summary suspension policy, it also began implementing Operation Refusal's suspension and revocation policy, by which the TLC sought to suspend or revoke taxicab licenses, after a hearing, for first and second service refusal offenses. Pursuant to the policy, which classifies a service refusal as conduct against the public interest, the TLC initiates suspension and revocation proceedings pursuant to § 2-86 of the TLC Rules, which provides for a fine, suspension, or revocation to be imposed as penalties for violations of § 2-61(a)(2). The suspension and revocation policy, inasmuch as it authorized discretionary suspension or revocation of licenses for service refusals, shifted the adjudication of service refusal charges from judges in the Office of Administrative Trials and Hearings ("OATH") to TLC ALJs. Pursuant to § 8-14(b) of the TLC Rules, when the penalties for a given charge do not include discretionary or mandatory revocation, the proceedings on the merits of that charge are commenced before OATH judges. 35 RCNY § 8-14(b). When the penalties for a charge do include discretionary or mandatory suspension or revocation, the proceedings shall be commenced before the Commission Adjudications Tribunal and heard by a TLC ALJ. Id. Because § 2-86, authorizes discretionary suspension or revocation of licences for violations of §

2-61(a)(2), service refusal proceedings brought under Operation Refusal are heard by a TLC ALJ.

TLC ALJs, unlike OATH judges, are employed by the TLC. The Chairperson schedules TLC ALJs to hear cases. The TLC ALJs are authorized to "make final findings of fact" and may only recommend a final decision, determination or order. N.Y.C. Charter § 1046(e). Upon a finding of conduct against the public interest or welfare, the TLC ALJs may recommend revocation. This recommendation is then reviewed by the Chairperson, who may adopt, modify or reject the recommendation. 35 RCNY § 8-14(j). If the Chairperson adopts the recommendation, the license is revoked. The driver may appeal the Chairperson's decision to the full TLC within thirty days. 35 RCNY § 8-14(k).

D. The Individual Plaintiffs

The individual taxicab driver plaintiffs were subject to Operation Refusal's summary suspension policy and suspension and revocation policy. The Padberg plaintiffs include Rashid Ahmed, John Padberg and Clifford Paolillo. n4 With respect to these plaintiffs, the Court reiterates the facts set forth in its prior opinion on their motion for preliminary injunction. See Padberg, 108 F. Supp. 2d at 181-82.

1. Rashid Ahmed

On December 2, 1999, Ahmed asked a prospective fare where he was going, even though he had already illuminated his "Off Duty" light. The passenger told Ahmed his destination, and Ahmed refused to take him. The passenger, a New York City police officer who was working undercover as part of Operation Refusal, issued Ahmed two summonses for violations of § 2-50(b)

(service refusal) and § 2-61(a)(2) (acting against the best interests of the public). He summarily suspended Ahmed's license and confiscated his taxicab. Several days later, Ahmed alleges that he appeared at the TLC offices in Long Island City for his "summary suspension hearing," but was told by the clerk that nothing was scheduled on the matter for that day.

Almost three months later, Ahmed had a revocation hearing on the merits on February 24, 2000, before OATH ALJ McFaul. ALJ McFaul found that Ahmed had refused service for economic reasons, and recommended a fine of $ 300.00 pursuant to § 2-87(a)(1), the prescribed penalty for a first violation of § 2-50(b). As of the date of the preliminary injunction hearing before this Court on June 29, 2000, Chairperson McGrath-McKechnie had not yet rendered a final decision on Ahmed's case. Ahmed claimed that his suspension continued for seven months, while the TLC contends that his suspension was lifted sixty days after the revocation hearing, pursuant to § 8-16(f), apparently without notice to Ahmed. Ahmed's license to operate taxicabs expired on May 31, 2000.

2. John Padberg

On February 15, 2000, TLC agents Alston ("Alston"), who is African-American, and Bonilla ("Bonilla"), who is Caucasian, conducted a sting operation as part of Operation Refusal. Alston and Bonilla positioned themselves on consecutive blocks, with Bonilla a block behind Alston. As Padberg approached, Alston, and immediately thereafter Bonilla, attempted to hail him. Padberg stopped for Bonilla, whereupon Alston issued Padberg two summonses for violations of 2-50(b) and 2-61(a)(2), summarily suspended his license and confiscated his car. At Padberg's "summary suspension

hearing" on February 18, 2000, TLC ALJ Schwartz noted sufficient allegations of service refusal, combined with a prior record of violations, warranted the continuation of the suspension.

A revocation hearing was held before TLC ALJ Elliott on March 6, 2000. ALJ Elliott found that Padberg had refused service in violation of § 2-50(b). Pursuant to TLC policy, Elliott found that the service refusal also constituted an act against the best interests of the public, in violation of § 2-61(a)(2). Elliott therefore recommended revocation. In response to this recommendation, Padberg submitted a letter and character references to TLC on March 31, 2000. After reviewing Padberg's submissions, Chairperson McGrath-McKechnie adopted the ALJ's recommendation on May 9, 2000, revoking Padberg's license. Padberg did not administratively appeal this ruling, and his time to do so expired on June 9, 2000.

3. Baig Plaintiffs

The Baig plaintiffs include Abid Baig, Mohammed Khan, Khalid Mahmood, Mulugheta Sultan and the NYTWA. All four taxi driver plaintiffs had their licenses summarily suspended pursuant to Operation Refusal. Baig's license was summarily suspended on November 12, 1999. Khan's license was summarily suspended on November 19, 1999. Mahmood's license was summarily suspended on December 2, 1999. Sultan's license was summarily suspended on April 7, 2000. In all four cases a summary suspension hearing was held before a TLC ALJ, and the summary suspension was upheld. Revocation proceedings were commenced before OATH judges for Baig, Khan, and Mahmood. In all three cases the OATH judges recommended against revocation. In Mahmood's case, his license was returned pending a final decision

by the TLC on this recommendation. Mahmood Aff. P 9. Revocation proceedings were commenced against Sultan before a TLC ALJ, who recommended revocation for violation of § 2-61. On August 3, 2000, Chairperson McGrath-McKechnie adopted the ALJs recommendation and Sultan's license was revoked. Sultan filed a timely appeal with the TLC on August 10, 2000. As of the commencement of this suit in November 2000, the TLC had not decided that appeal and Sultan remained without his license.

NYTWA is a membership-based organization of approximately 2000 taxicab driver members with a stated mission of "fighting for the rights, respect, [sic] dignity of New York City taxi-drivers." Aff. of Bhairavi Desai P 2 ("Desai Aff. "). The goal of NYTWA is to "create systematic, long-term changes, which will transform the daily conditions of all taxi-drivers." Id. The NYTWA commenced this action on behalf of its members and on its own behalf, claiming injury to its members and the organization itself. NYTWA claims that Operation Refusal has caused injury to its members by interfering with their ability to earn a livelihood. NYTWA also alleges that the organization itself has been harmed by being forced to expend scarce resources to defend individual members in TLC hearings, thus diverting resources from more broad-based efforts to improve working conditions in the taxi and limousine industry.

DISCUSSION

Plaintiffs in both Padberg and Baig seek summary judgment on the ground that both Operation Refusal policies violated due process. First, plaintiffs maintain that Operation Refusal itself is not authorized by New York City law. Plaintiffs maintain, in the alternative, that both policies fail to provide the procedural safeguards

necessary to satisfy due process. Defendants cross-move for summary judgment, arguing that the policies are authorized and do not violate plaintiffs' due process rights. As a threshold matter, defendants also challenge NYTWA's standing to raise a § 1983 claim on its own behalf and on behalf of its members.

A. Summary Judgment Standard

Summary judgment may not be granted unless "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The burden to show that no genuine issue of material fact exists lies with the moving party. Gallo v. Prudential Residential Servs., Ltd., 22 F.3d 1219, 1223 (2d Cir. 1994). An issue of material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). When considering cross-motions for summary judgment in which both parties assert an absence of a genuine issue of material fact, a court need not enter a judgment for either party, but must examine each motion separately and, in each case, draw all reasonable inferences against the moving party. Morales v. Quintel Entm't, Inc., 249 F.3d 115, 121 (2d Cir. 2001); Heublein, Inc. v. United States, 996 F.2d 1455, 1461 (2d Cir. 1993).

B. NYTWA's Standing

Article III of the Constitution requires, at a minimum, that a plaintiff be able to demonstrate that, "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not

conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180-81, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). An organization may attempt to assert standing on its own behalf, see Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 n. 19, 102 S. Ct. 1114, 71 L. Ed. 2d 214 (1982), or on behalf of its members, see Warth v. Seldin, 422 U.S. 490, 511, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975).

When asserting standing on its own behalf, an organization must be able to demonstrate some injury to the association itself that meets the three requirements above. See Havens, 455 U.S. at 378-79. Because of the "injury in fact" requirement, NYTWA must demonstrate that it has more than simply "[an] abstract concern with a subject that could be affected by an adjudication [of the pending case]." Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 40, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976). Nevertheless, having to divert scarce resources away from other organization activities as a result of the challenged conduct may qualify as an injury that confers standing. See Havens, 455 U.S. at 379; Ragin v. Harry Macklowe Real Estate Co., 6 F.3d 898, 905 (2d Cir. 1993); Village of Bellwood v. Dwivedi, 895 F.2d 1521, 1526 (7th Cir. 1990). In both Havens and Ragin the plaintiff housing organizations were able to demonstrate they were forced to divert resources away from other activities, such as counseling and referral services for those seeking homes, in order to investigate and challenge defendants' discriminatory housing practices. Havens, 455 U.S. at 378-79; Ragin, 6 F.3d at 905. The

"opportunity cost" of such a diversion of resources is a sufficient injury to confer standing on the organization on its own behalf. See Village of Bellwood, 895 F.2d at 1526.

In the instant case, NYTWA has done more than show merely that Operation Refusal affects causes and issues that greatly concern the organization, an injury that is too abstract to confer standing. See Simon, 426 U.S. at 40 (organizational plaintiff's mission to ensure all people were provided with adequate health care did not, by itself, give it standing to challenge a measure that limited the availability of health care and, consequently, made it more difficult for the organization to achieve its goals); Nat'l Cong. For Puerto Rican Rights v. City of New York, 75 F. Supp. 2d 154, 164-65 (S.D.N.Y. 1999) (organizational plaintiff's objective to combat discrimination against Puerto Ricans was too generalized to confer standing to challenge the unconstitutional practices of the Street Crimes Unit of the NYPD). NYTWA has demonstrated that it has suffered an "opportunity cost" similar to that experienced by the plaintiffs in Havens and Ragin. NYTWA points out that it seeks to devote its resources to activities aimed at achieving broader reform in the taxi and limousine industry by organizing taxi drivers and leading initiatives to ameliorate working conditions. Desai Aff. P 4. As a result of Operation Refusal, the demand for more individualized services, such as representation at TLC hearings and counseling on TLC service refusal rules, has increased. NYTWA has adequately demonstrated that, as a result of Operation Refusal, it has had to divert greater resources to more individualized services and away from the reform efforts in which it engages. NYTWA, therefore, has standing on its own behalf.

However, NYTWA does not have standing to raise a § 1983 claim on behalf of its members. In general, an organization has standing to bring suit on behalf of its members only if it can demonstrate that "its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Friends of the Earth, 528 U.S. at 181 (citing Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977)); see also Warth, 422 U.S. at 511 (members of an association must show that the challenged conduct poses a threat of injury to them before an association can bring suit on their behalf). The Second Circuit, however, recognizes a limit on the organizational standing doctrine for claims brought under 42 U.S.C. § 1983. See League of Women Voters of Nassau County v. Nassau County Bd. Of Supervisors, 737 F.2d 155, 160 (2d Cir. 1984). Because § 1983 creates only a personal cause of action, requiring that plaintiffs demonstrate that they personally suffer from a violation of their civil rights, an organization may not bring § 1983 claims on behalf of its injured members. See id. at 160 (citing Aguayo v. Richardson, 473 F.2d 1090, 1099 (2d Cir. 1973)); National Cong. for Puerto Rican Rights, 75 F. Supp. 2d at 164.

In establishing this rule, the Aguayo court was careful not to run afoul of the line of Supreme Court precedents recognizing an organization's standing to assert a claim to vindicate its members' constitutional right of association. See Aguayo, 473 F.2d at 1099-1100. This type of organizational standing had been previously recognized by the Second Circuit in Albany Welfare Rights Org. v Wyman, 493 F.2d 1319 (2d Cir. 1974). Thus, a narrow exception to the Second Circuit rule barring

organizations from asserting the § 1983 claims of its members continues to exist if the challenged conduct involves an abridgment of associational rights of "both the association and [its] members." Aguayo, 473 F.2d at 1100; see also Am. Charities for Reasonable Fundraising Regulation, Inc. v. Shiffrin, 46 F. Supp. 2d 143, 152-53 (D. Conn. 1999).

NYTWA has not claimed that Operation Refusal violates its members' right of association. At most, NYTWA argues that the aggressive nature of Operation Refusal "sends a message to drivers that the TLC has unbridled power to violate their rights, even if the agency's actions are unconstitutional, which obstructs our ability to effectively organize drivers within the industry." Desai Aff. P 4. This stated effect does not articulate a claim that NYTWA members' associational rights have been violated. Moreover, the effect is purely hypothetical. It is just as plausible to believe that the more aggressive enforcement tactics utilized by the TLC would make it easier to organize drivers to protest these more aggressive measures. Thus, while NYTWA may bring a § 1983 claim for alleged violations of the organization's own civil rights, it has no standing to assert the § 1983 claims of its members.

C. Due Process Claims under § 1983

To prevail on a § 1983 claim, plaintiffs must prove (1) that the challenged practices are attributable, at least in part, to a person acting under color of state law and (2) that the challenged practices deprive the plaintiffs of a right, privilege or immunity secured by the Constitution or laws of the United States. See Wimmer v. Suffolk County Police Dep't, 176 F.3d 125, 136-37 (2d Cir. 1999). The parties do not dispute that the individual defendants were acting under color of law. Moreover, there is no

dispute that plaintiffs state a valid § 1983 claim against the municipal defendant, the TLC, based on the policy or practice identified as Operation Refusal. See id. at 137 (citing Monell v. Dep't of Social Servs., 436 U.S. 658, 694, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)). The only issue is whether the challenged policies and practices violated plaintiffs' due process rights.

1. Summary Suspension Policy

Plaintiffs advance three arguments with respect to the TLC's summary suspension policy. First, plaintiffs argue that Chairperson McGrath-McKechnie and Mayor Giuliani denied them due process by initiating Operation Refusal without a vote of the full Commission which, plaintiffs maintain, is required by the N.Y.C. Charter. Second, plaintiffs contend that the practice of summarily suspending taxi licenses for service refusals violates due process because the Administrative Code does not grant the TLC the authority to take such measures. Finally, plaintiffs argue that summary suspension without a prior hearing violates due process. Defendants cross-move for summary judgment, arguing that the summary suspension policy is authorized by law and comports with the requirements of due process.

a. Procedural Due Process

The Court begins by addressing plaintiff's final argument. Due process protects against arbitrary government action that deprives individuals of a protected interest. County of Sacramento v. Lewis, 523 U.S. 833, 845, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998). As explained in this Court's prior decision denying the Padberg plaintiffs' motion for a preliminary injunction, see Padberg, 108 F. Supp. 2d at 184-85, taxicab drivers have a property interest in their taxicab licenses

sufficient to trigger due process protection. See Mackey v. Montrym, 443 U.S. 1, 11, 99 S. Ct. 2612, 61 L. Ed. 2d 321 (1979); Dixon v. Love, 431 U.S. 105, 112, 97 S. Ct. 1723, 52 L. Ed. 2d 172 (1977); Bell v. Burson, 402 U.S. 535, 539, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971). However, due process does not forbid the deprivation of a protected property interest under all circumstances. Rather, procedural due process is a flexible concept that "calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972).

Plaintiffs' procedural due process challenge to the summary suspension procedures involves two separate questions: first, whether it was a violation of due process to deprive plaintiffs of their licenses prior to a hearing; and second, if a presuspension hearing was not constitutionally mandated, whether the procedures followed by the TLC in the postsuspension hearings were sufficient to protect plaintiffs' due process rights. In addressing these two questions, the Court has but a single task -- to evaluate the particular circumstances presented by this case and determine "what process is due." Morrissey, 408 U.S. at 481.

Procedural due process generally requires that an individual be given notice and an opportunity to be heard before the government may deprive him of property. Fuentes v. Shevin, 407 U.S. 67, 82, 92 S. Ct. 1983, 32 L. Ed 2d 556 (1972). Nevertheless, the Supreme Court has recognized that due process "[does not] always require[] the State to provide a hearing prior to the initial deprivation of property." Parratt v. Taylor, 451 U.S. 527, 540, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981) (emphasis in original), overruled in part on other grounds, Daniels v. Williams, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986). Adequate postdeprivation

procedures may satisfy due process requirements "where a State must act quickly, or where it would be impractical to provide predeprivation process." Gilbert v. Homar, 520 U.S. 924, 930, 117 S. Ct. 1807, 138 L. Ed. 2d 120 (1997). More specifically, the Supreme Court has stated that "an important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation." Id. at 930-31 (quoting FDIC v. Mallen, 486 U.S. 230, 240, 108 S. Ct. 1780, 100 L. Ed. 2d 265 (1988)).

In assessing what process is due, the Court is guided by the familiar balancing test enunciated in Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). According to Eldridge, the Court must consider:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute requirement would entail.

Mathews, 424 U.S. at 335.

The weight of the private interest depends on both the nature of the private interest and the duration of the deprivation. See Gilbert, 520 U.S. at 932 (citing Logan v. Zimmerman Brush Co., 455 U.S. 422, 434, 102 S. Ct. 1148, 71 L. Ed. 2d 265 (1982)); Mackey, 443 U.S. at 12. Plaintiffs' interest in their taxicab license is profound. Suspending their licences does far more than inconvenience drivers; it deprives them of their very

livelihood. The Supreme Court has recognized on a number of occasions that a person's means of support enjoys heightened significance as a property interest. See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 543, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985); Bell, 402 U.S. at 539; Goldberg v. Kelly, 397 U.S. 254, 264, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970). Of these decisions, Bell is particularly notable. In that case, the Supreme Court specifically acknowledged that a driver's license, once issued, could become "essential to the pursuit of a livelihood." Bell, 402 U.S. at 539. Such is undeniably the case with the plaintiff taxi drivers.

The interference with this significant private interest is further exacerbated by the duration of the summary suspension. On their face, the TLC Rules appear to have built-in protections to ensure that any such suspension does not last indefinitely. For example, the Rules provide that, if the driver contests his suspension, the TLC must grant him a hearing within ten days after they receive his request. 35 RCNY § 8-16(c). Nevertheless, this hearing is little more than a pro forma verification by the TLC ALJ that the summons was properly filled out with the defendant having no chance to present evidence in his favor. n5 Accordingly, it does nothing to limit the duration of the suspension. Indeed, in the case of plaintiff Ahmed, it was not until nearly three months after the date his summary suspension hearing was to take place that Ahmed was given a full hearing on the merits before an OATH judge. See Aff. of Rashid Ahmed PP 3-4. Thus, although the TLC Rules seem crafted to avoid delay and ensure prompt review of suspensions, in practice their protections are illusory. Drivers are still faced with the prospect of extended periods without the means to earn a living.

Turning to the second Mathews factor, the Court must evaluate the risk of erroneous deprivation in service refusal cases. In assessing this risk, it is important to remember that the TLC Rules do not contemplate a per se prohibition against service refusals in all circumstances. To the contrary, § 2-50(e) outlines no less than eleven situations in which a service refusal is justified. See 35 RCNY § 2-50(e)(1)-(11). Hence, there is considerable room for misinterpretation by the TLC inspector issuing the summons as to the reason for the refusal. Yet the drivers cited for violations under Operation Refusal are stripped of their licenses before they are afforded the opportunity to present their side of the story. Moreover, at the initial summary suspension hearing, they are not allowed to present evidence in their favor or challenge the allegation in any way. The fate of the drivers is therefore entirely dependent on the impressions of the TLC inspectors. Even the most experienced inspector can make an honest mistake, especially when he is asked to determine something as subjective as motive rather than actions. If the only issue were whether the driver failed to acknowledge a hail, the good faith allegations of a TLC inspector may be sufficient, at least initially, to suspend a license. Where, as here, the issue is not just whether a driver failed to acknowledge a hail, but rather whether he did so out of racial animus, or for any other unjustified reason, the obvious possibility for error and misinterpretation requires additional protection.

It is the subjective nature of the evidence in service refusal suspensions, inter alia, that distinguishes this case from other cases where predeprivation hearings were not required. See Mackey, 443 U.S. at 19; Dixon, 431 U.S. at 115; Barry v. Barchi, 443 U.S. 55, 66, 99 S. Ct. 2642, 61 L. Ed. 2d 365 (1979). In Mackey, a case involving a Massachusetts law mandating the summary

suspension of a driver's license for refusing to take a breath-analysis test, the Supreme Court stressed that "perfect, error-free determinations" are not required, and that as long as there is "a reasonably reliable basis" to conclude that the officer's version of the facts was correct, that is enough to suspend a driver's license pending a prompt postdeprivation hearing. Mackey, 443 U.S. at 13. Nevertheless, in that case, the risk of erroneous deprivation was far less because the suspension was based on objective facts. It is relatively easy to determine whether there is a legitimate reason to suspect someone of driving while intoxicated. The arresting officer will have the opportunity to observe the driver's condition and take note of the tell-tale signs of intoxication. Such readily verifiable evidence is not present in service refusal cases.

Both Dixon and Barry are similar to Mackey in this respect. In Dixon, the Supreme Court held that a predeprivation hearing was not necessary under an Illinois statute that provided for summary driver's license suspensions based on the driver's prior driving record. See Dixon, 431 U.S. at 115. In Barry, the Supreme Court upheld the constitutionality of pre-hearing suspensions under a New York statute that provided for summary suspensions of a horse trainer's license if he knew, or had reason to know, that his horse had been drugged. See Barry, 443 U.S. at 66. In both Dixon and Barry, as in Mackey, the nature of the infraction leaves little room for error. The driver's record in Dixon is not subject to interpretation or argument. Indeed, as the Court recognized, the only possible mistake that could call the suspension into question would be a clerical error that could be rectified quickly without a formal hearing. See Dixon, 431 U.S. at 113. In Barry, a positive drug test is an objectively verifiable piece of evidence that, while not necessarily

determining fault, is sufficiently reliable to support a suspension pending a prompt postsuspension hearing. See Barry, 443 U.S. at 65-66. In the case at bar, the focus is not on fact, but on impressions readily susceptible to mistake and misperception.

Furthermore, in those cases in which the Supreme Court has upheld summary suspensions without a hearing, the availability of prompt, meaningful postsuspension procedures to rectify any erroneous or questionable deprivation has been a critical component of their analysis. In Mackey, the statute entitled the driver to an immediate postsuspension hearing before the Registrar of Motor Vehicles. See Mackey, 443 U.S. at 7 & n.5. In Barry, although the Supreme Court held that the lack of a predeprivation hearing was constitutionally permissible, the lack of any substantive postdeprivation hearing violated due process. See Barry, 443 U.S. at 66. As the Court stated, "once suspension has been imposed, the [license holder's] interest in a speedy resolution of the controversy becomes paramount," and an "early and reliable determination" of the facts becomes a matter of constitutional imperative. Id.

In the instant case, the available postsuspension procedures provided little, if any, protection of the taxicab driver's due process rights. As previously mentioned, the TLC Rules appear on their face to provide quick review of the summary license suspensions. See 35 RCNY § 8-16(b) (requiring revocation proceedings to begin within five calendar days of the summary suspension); 35 RCNY § 8-16(c) (providing for summary suspension hearings within ten days of receipt of the driver's request for a hearing). Nevertheless, countless affidavits from taxicab drivers who challenged their suspensions reveal that the seemingly strict protections embodied in the TLC Rules

were more honored in the breach than the observance. At these summary suspension hearings the drivers were not allowed to speak on their behalf or present evidence in their defense. See Aff. of Khalid Mahmood P 5; Aff. of Mulugheta Sultan P 5; Aff. of Carl Joseph P 5; Aff. of Adam M. Madibo P 5; Aff. of Ibrahima Mbengue P 6. Indeed, the TLC inspectors who issued the summonses were not required to appear and, in most cases, did not. See Mahmood Aff. P 5; Sultan Aff. P 5; Madibo Aff. P 5; Mbengue Aff. P 6.

While the Court recognizes that "something less than an evidentiary hearing is sufficient prior to adverse administrative action," see Mathews, 424 U.S. at 343, certainly what took place here fell far short of providing the drivers with the opportunity to be heard "in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965). Instead, critical questions of fact and credibility were left unresolved until long after the summary suspensions. When the procedures in place do not allow for the presentation of potentially exculpatory evidence, there is little doubt that due process rights are in jeopardy. See Bell, 402 U.S. at 542 ("It is a proposition which hardly seems to need explication that a hearing which excludes consideration of an element essential to the decision whether [to suspend a license] does not meet [the] standard [of a meaningful hearing]."). In a similar fashion, when the postsuspension procedures are as perfunctory as those used in this case, the risk of erroneous deprivation increases exponentially.

Finally, the third Mathews factor -- the government's interest -- counsels in favor of additional protections. A service refusal on the basis of race is a deplorable and unacceptable practice. The TLC is right to aggressively pursue those taxicab drivers who engage in such

practices. But aggressive enforcement of TLC policy, no matter how laudable or necessary, must conform to the mandates of the Constitution. As a general rule, depriving someone of a property interest prior to a hearing will be condoned only in "extraordinary situations." Fuentes, 407 U.S. at 90 (citing Boddie v. Connecticut, 401 U.S. 371, 379, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971)). These circumstances exist not just when there is an important government interest at stake, but also when "very prompt action is necessary." United States v. All Assets of Statewide Auto Parts, 971 F.2d 896, 903 (2d Cir. 1992) (citing Fuentes, 407 U.S. at 91).

Typically, the Supreme Court has allowed deprivation prior to a hearing in cases involving pressing and immediate threats to the public health and safety. See Mackey, 443 U.S. at 17 ("We have traditionally accorded the states great leeway in adopting summary procedures to protect public health and safety."). In Mackey, where the statute in question was designed to remove potential drunk drivers from the road, the State of Massachusetts clearly had a compelling need for immediate action. To allow the driver to retain his license under such circumstances would place lives in danger. Moreover, as the Court noted, providing for a presuspension hearing would encourage drivers to refuse to take the breath-analysis test, thereby compromising the goal of ensuring safety on public highways. See id. at 18. Both Dixon and Barry involved similar concerns. In Dixon, the statute provided for summary suspension of a driver's license if the driver accumulated too many moving violations. As in Mackey, the very serious threat to public safety posed by a repeatedly irresponsible driver warranted a prompt response. See Dixon, 431 U.S. at 114. In Barry, although the Court did not specifically address why immediate action was necessary, the prospect that the trainer might drug other horses,

irreparably impacting the fairness of the race and wagering, made the need for immediate action obvious. In this case, although racially-motivated service refusals perpetuate the problem of racial discrimination and those who commit such offenses must be held accountable, the circumstances do not present the sort of immediate threats to health and safety that would permit summary suspension. If a taxicab driver has refused service on the basis of race, the Court sees little danger in holding him accountable at most ten days later at a meaningful hearing on the merits. Thus, the Court is not suggesting that these offenders slip through the cracks, but rather that the urgency to impose summary discipline is not as great as with other conduct. Prompt, meaningful suspension hearings held less than two weeks after an alleged service refusal would meet the TLC's legitimate goal, providing the same impact and deterrent effect.

Furthermore, the Court notes that it would be no additional burden for the TLC to provide appropriate procedures in service refusal cases. According to § 8-16(b), as long as the driver does not request a summary suspension hearing pursuant to § 8-16(c)-(d) to contest the validity of the suspension, he is entitled to a full revocation proceeding no more than five calendar days after the suspension. See 35 RCNY § § 8-16(b)-(d). Thus, the TLC seems already equipped to handle the demand for such hearings. Indeed, as the Court pointed out in its previous opinion, transforming these revocation hearings into summary suspension hearings involving a discussion of the merits of the case may, in fact, eliminate the need for two separate hearings.

As a final point, it is worth remembering that the TLC's goal in implementing Operation Refusal was to eliminate racial discrimination among cab drivers. Nevertheless,

in practice Operation Refusal mandates summary suspensions for any kind of service refusal, whether it is race-based or not. The Operation Refusal Enforcement Directive says nothing about specifically targeting race-based refusals, but rather dictates that all violations of § 2-50 will be remedied by summary license suspension. See "Operation Refusal Enforcement Directive," Horowitz Decl., Ex. A. This would include such comparatively innocuous infractions as destination-based service refusals. See 35 RCNY § 2-50(a)-(b). Thus, the TLC has diluted the strength of its interest somewhat by casting its net too wide, sweeping in the merely irksome offenses with the truly invidious.

Given the strength of the taxi drivers' compelling interest in their licenses and the substantial risk of erroneous deprivation balanced against the important, but not immediate, need for the TLC to discipline those who refuse service, the Court finds that depriving the plaintiffs of a presuspension hearing violated their due process rights. Moreover, even if due process were not to require a presuspension hearing under these circumstances, the procedures followed in the summary suspension hearings were inadequate to safeguard plaintiffs' due process rights. The Court believes it would be inappropriate to specify exactly what form a proper summary suspension hearing should take, other than to reiterate that plaintiff must be afforded some meaningful opportunity to address the merits of his case. See Bell, 402 U.S. at 542 (declining to specify what would constitute appropriate proceedings other than to state that they must at least allow for a determination of whether the action taken against the driver was a mistake); Loudermill, 470 U.S. at 546 (noting that while a full evidentiary hearing is not usually required, the one being deprived of his property must be given at least "an opportunity to present his side

of the story"). Whether this takes the form of a full evidentiary hearing or "something less," see Mathews, 424 U.S. at 343, is not for the Court to decide. Accordingly, plaintiffs' motion for summary judgment on their procedural due process claim challenging summary suspension is granted. Defendants' cross-motion is denied.

2. Suspension and Revocation Policy

Plaintiffs also challenge on similar due process grounds the TLC's practice of suspending taxicab licenses, after a hearing, for first and second service refusal offenses. Plaintiffs contend that the TLC lacks authority under the Administrative Code to impose such a penalty, even after a hearing. Plaintiffs also maintain that this practice, like the practice of summarily suspending taxicab licenses without a hearing, is unauthorized because Mayor Giuliani and Chairperson McGrath-McKechnie implemented it without the formal approval of the full TLC. Plaintiffs also contend that even if the policy is authorized, § 2-61(a)(2) of the TLC Rules, which prohibits conduct "against the best interests of the public," and which plaintiffs were found to have violated, is unconstitutionally vague. Finally, plaintiffs argue that the suspension and revocation hearings, conducted by TLC ALJs, suffered from bias, rendering them ineffective to protect plaintiffs' due process rights. n6

a. Substantive Due Process

Plaintiffs' first and second arguments advance substantive due process claims, as opposed to procedural due process claims. By asserting that the Mayor, the Chairperson and the TLC were acting beyond the scope of the authority granted to them, plaintiffs are

not focusing on the procedures followed at the hearings where their licenses were suspended or revoked, n7 but rather on the notion that, regardless of the adequacy of the procedures, these penalties were unauthorized and should never have been imposed. See Daniels v. Williams, 474 U.S. 327, 331, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986) (substantive due process safeguards an individual's right to life, liberty and property against "certain government actions regardless of the procedures used to implement them"); see also Amsden v. Moran, 904 F.2d 748, 754 (1st Cir. 1990), cert. denied, 498 U.S. 1041, 111 S. Ct. 713, 112 L. Ed. 2d 702 (1991) ("As distinguished from its procedural cousin . . . a substantive due process inquiry focuses on 'what' the government has done, as opposed to 'how and when' the government did it.").

While the Supreme Court has recognized that the due process clause has a substantive component, it has nevertheless been wary of "expanding the concept of substantive due process because guideposts for reasonable decisionmaking in this unchartered area are scarce and open-ended." Collins v. City of Harker Heights, 503 U.S. 115, 125, 112 S. Ct 1061, 117 L. Ed. 2d 261 (1992). Accordingly, the protections of substantive due process are limited to government action that is "arbitrary, conscience-shocking, or oppressive in a constitutional sense, but not against government action that is incorrect or ill-advised." Lowrance v. Achtyl, 20 F.3d 529, 537 (2d Cir. 1994) (emphasis added) (quotation marks and citations omitted); see also Kaluczky v. City of White Plains, 57 F.3d 202, 211 (2d Cir. 1995). As the Second Circuit explained:

Substantive due process is an outer limit on the legitimacy of governmental action. It does not forbid governmental actions that might fairly be deemed

arbitrary or capricious and for that reason correctable in a state court lawsuit seeking review of administrative action. Substantive due process standards are violated only by conduct that is so outrageously arbitrary as to constitute a gross abuse of governmental authority.

Natale v. Town of Ridgefield, 170 F.3d 258, 263 (2d Cir. 1999); see also County of Sacramento v. Lewis, 523 U.S. at 846 ("Only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense,'") (quoting Collins, 503 U.S. at 129). Indeed, even a violation of state law may not rise to the level of arbitrary and outrageous conduct. See Adler v. County of Nassau, 113 F. Supp. 2d 423, 430 (E.D.N.Y. 2000) (citing Natale, 170 F.3d at 263); cf. Amsden, 904 F.2d at 757 ("[A] regulatory board does not transgress constitutional due process requirements merely . . . by making 'demands which arguably exceed its authority under the relevant state statutes.'") (citation omitted). It is only when government officials "exercise [their] power without any reasonable justification in the service of a legitimate governmental objective" that substantive due process is violated. Lewis, 523 U.S. at 846. n8

Plaintiffs first contend that Mayor Giuliani and Chairperson McGrath-McKechnie circumvented the procedures in the N.Y.C. Charter by initiating the summary suspension policy of Operation Refusal without a vote of the full Commission. As plaintiffs point out, the N.Y.C. Charter states, "A majority of the whole number of members of the commission then in office shall constitute a quorum for the transaction of any business. The commission shall have power to act by a majority of its members." N.Y.C. Charter § 2301(e). Plaintiffs argue that § 2301(e) mandates that better than fifty percent of the commissioners must vote to approve

a measure such as Operation Refusal. However, the N.Y.C. Charter also states that he TLC Chairperson shall act as "chairman and chief executive officer" of the Commission, with the authority to "employ, assign and superintend the duties of such officers and employees as may be necessary to carry out the provisions of this chapter." N.Y.C. Charter § 2301(c). This provision, defendants assert, grants Chairperson McGrath-McKechnie a general supervisory authority over TLC agents and employees that gave her the power to implement certain policy directives on behalf of the full Commission.

Plaintiffs contend that § 2301(c) cannot supersede the clear directives of § 2301(e) and that any such interpretation is patently erroneous. However, as previously explained, merely "incorrect" or "ill-advised" government action does not violate substantive due process. Lowrance, 20 F.3d at 537. Even assuming that a vote were required, Chairperson McGrath-McKechnie had at least a reasonable basis to believe that she did possess the authority to initiate Operation Refusal under § 2301(c). Her action, even if unauthorized by the Charter, cannot be considered a "gross abuse" of her power rising to the level of a constitutional violation. Natale, 170 F.3d at 263; see also Amsden, 904 F.2d at 757 (official does not violate due process by arguably exceeding the authority granted to him). Nor is it entirely clear that Chairperson McGrath-McKechnie's understanding of her own authority was incorrect. Plaintiffs have provided no authority, other than the language of the N.Y.C. Charter itself, supporting the proposition that the Chairperson needed the vote of the Commission to promulgate an enforcement policy such as Operation Refusal. With only the language of the Charter to follow, the Court cannot say with certainty that Chairperson McGrath-McKechnie's actions were

even unauthorized, much less that they were arbitrary in the constitutional sense.

Moreover, there is nothing to suggest that Chairperson McGrath-McKechnie or Mayor Giuliani were prompted to act by anything but legitimate motives. Both were attempting to rectify the problem of race-based service refusals among taxicab drivers by increasing the penalties imposed for such an infraction. Plaintiffs' bare allegation that Mayor Giuliani initiated this new enforcement program in response to a highly publicized complaint in order to further his own political purposes, if credited, does not render the conduct a gross abuse of government authority. The Mayor was responding to a matter of public concern. The fact that a public official may derive political benefit from his or her pursuit of an otherwise legitimate government objective does not make that objective any less legitimate. In sum, these are not the type of egregious government actions that offend substantive due process.

Plaintiffs next contend that the practice of suspending and revoking taxi licenses, after a hearing, for first and second service refusal offenses violates due process because the Administrative Code does not authorize such a penalty. To understand the issue presented, we must first examine the interplay between the N.Y.C. Charter, the Administrative Code and the TLC Rules. As previously mentioned, the N.Y.C. Charter delegates to the TLC the authority to regulate and supervise several aspects of the city's transportation industry, including "the revocation and suspension of licenses for vehicles" and "the issuance, revocation, suspension of licenses for drivers, chauffeurs, owners or operators of vehicles." N.Y.C. Charter § 2303(b)(3) & (b)(5). Pursuant to this authority, the TLC promulgates rules establishing the agency's policies and procedures with respect to license suspension. Nevertheless, despite this broad grant of

rule-making authority, a rule adopted by the TLC cannot conflict with a statute passed by the City Council. It is well-settled that "an agency cannot 'promulgate rules in contravention of the will of the Legislature.'" Matter of Beer Garden, Inc. v. New York State Liquor Auth., 79 N.Y.2d 266, 276, 582 N.Y.S.2d 65, 590 N.E.2d 1193 (1992) (quoting Finger Lakes Racing Ass'n v. New York State Racing & Wagering Bd., 45 N.Y.2d 471, 480, 410 N.Y.S.2d 268, 382 N.E.2d 1131 (1978); see also Matter of Trump-Equitable Fifth Ave. Co. v. Gliedman, 57 N.Y.2d 588, 595, 457 N.Y.S.2d 466, 443 N.E.2d 940 (1982) (same). Accordingly, any TLC rule that extends its authority beyond the limitations imposed by the City Council is invalid.

Plaintiffs maintain that imposing a penalty of license suspension or revocation for a first or second service refusal, even if permitted under the TLC Rules, exceeds the authorized penalties for the same offense set out in § 19-507 of the Administrative Code. Section 19-507, entitled "Mandatory penalties," outlines the following penalty scheme for unjustified service refusals: for a first offense, a fine of $ 200-$ 300; for a second offense within twenty-four months, a fine of $ 350-$ 500 and possible license suspension for up to thirty days; and for a third offense within thirty-six months, license revocation. Admin. Code § 19-507(b)(1). Plaintiffs assert that these are the maximum allowable penalties for service refusals even if the TLC prosecutes those who commit unjustified service refusals under § 2-61(a)(2) of the TLC Rules (prohibiting conduct against the public interest) in addition to § 2-50 (prohibiting service refusals), as is the practice under Operation Refusal. Thus, to the extent that the TLC Rules allow for penalties for service refusals over and above those sanctioned by the City Council in § 19-507, plaintiffs claim that the rules must be invalid and cannot form the

basis for the increased penalties suffered by plaintiffs. Moreover, plaintiffs maintain that because no other provision of the Administrative Code supersedes the penalty scheme of § 19-507, suspending and revoking licenses for first and second service refusal offenses, even after a hearing, was unauthorized, and thus violated plaintiffs' due process rights.

Defendants counter that § 19-505(a) of the Administrative Code gives them general authority to suspend or revoke a license even for a first service refusal offense. Section 19-505(a) of the Code states, "the commission may, after a hearing, suspend or revoke any driver's license . . . for failure to comply with the commission's rules and regulations." Admin. Code § 19-505(a). Thus, despite the existence of the more specific penalty scheme for service refusals found in § 19-507, § 19-505(a) may be employed to impose penalties above and beyond those in § 19-507. Furthermore, defendants maintain that a violation of § 2-61(a)(2) of the TLC Rules is an entirely separate offense from a service refusal and therefore the TLC may proceed against a driver under both rules for the same incident. Section 2-61 (a)(2) carries its own stiffer penalty. See 35 RCNY § 2-86 (providing for a penalty of "$ 150-350 and/or suspension up to 30 days or revocation" for a violation of § 2-61 (a)(2)). Thus, even if the TLC is precluded from suspending or revoking licenses for a first service refusal offense under § 2-50, it can do so for a first offense violation of § 2-61 (a)(2) without running afoul of the limitations imposed by § 19-507 of the Administrative Code. Accordingly, defendants assert that Operation Refusal's suspension and revocation policy is authorized under the Administrative Code.

Regardless of whether plaintiffs or defendants are correct in their interpretation of the law, plaintiffs'

argument that defendants violated substantive due process by suspending and revoking their licenses for a first or second service refusal offense is unavailing. As previously explained, substantive due process does not protect against government action that is merely "incorrect or ill-advised." Lowrance, 20 F.3d at 537. In this case, defendants were relying upon a validly adopted TLC Rule (§ 2-61(a)(2)) and an Administrative Code provision (§ 19-505(a)) that at least arguably gave the TLC the power to impose penalties of license suspension and revocation for first and second service refusal offenses. It may indeed be true that § 19-507 of the Administrative Code limits the authority of the TLC to impose such penalties. Several OATH judges and state court judges who have addressed this issue have taken that position. See Taxi and Limousine Comm'n v. Ouali, OATH Index No. 1855/00 (Feb. 16, 2001); Taxi and Limousine Comm'n v. Park, OATH Index No. 1014/00 (Feb. 2, 2000); Taxi and Limousine Comm'n v. Asamoah, OATH Index No. 1120/00 (Feb. 2, 2000); Pierre-Lys v. New York City Taxi and Limousine Comm'n., Index No. SCNY7048/00 (N.Y. Civ. Ct. Jan. 14, 2002). However, it cannot be said that the TLC was exercising its power in an arbitrary or oppressive way.

In this respect, this case is similar to Rosa R. v. Connelly, 889 F.2d 435 (2d Cir. 1989). In that case, the Bridgeport Superintendent of Schools first suspended, and then expelled, a student for bringing a loaded gun to school. Id. at 436. The student was expelled for the maximum allowable time period under Connecticut law, 180 days, but was not given credit for the three months he was absent from school prior to the expulsion hearing. Id. The student's mother brought a § 1983 suit claiming, inter alia, that the failure to credit the time the student was absent from school towards the 180-day time period in effect lengthened the expulsion penalty

beyond the allowable limits of state law and therefore deprived the student of his property right to education in violation of substantive due process. See id. at 437. The Second Circuit affirmed the district court's grant of summary judgment, agreeing with the district court that it was immaterial that the Superintendent may have misinterpreted Connecticut law. See id. at 439. The deprivation would only be arbitrary and therefore violate substantive due process "in a rare case where there is no rational relationship between the punishment and the offense." Id. (internal quotation marks omitted). Because the superintendent could articulate valid reasons for not crediting the time the student was absent from school, there was no substantive due process violation. Id.

Such is the case here. Defendants were acting pursuant to authority that they believed they possessed in order to further the legitimate interest of eliminating racial discrimination among taxicab drivers. Regardless of whether defendants' interpretation of the TLC Rules and the Administrative Code may have been incorrect, suspending or revoking licenses for race-based service refusals was not arbitrary or irrational and therefore did not violate substantive due process. See id.; see also Interport Pilots Agency, Inc. v. Sammis, 14 F.3d 133, 145 (2d Cir. 1994) (administrative agency's policy statement that only New York pilots could operate vessels in New York waters in Long Island Sound, though based on an erroneous interpretation of statutory law, nevertheless did not violate Connecticut pilots' substantive due process rights). See id. at 145.

b. Procedural Due Process

Plaintiffs also challenge the suspension and revocation policy on two procedural due process grounds. First,

plaintiffs assert that § 2-61(a)(2) of the TLC Rules, which prohibits conduct that threatens "the best interests of the public," is unconstitutionally vague and therefore cannot serve as the basis for suspending or revoking their licenses. Second, plaintiffs contend that they were denied a fair hearing because the TLC ALJ's who presided over their suspension hearings were tainted by bias. Plaintiffs do not seek summary judgment on the basis of this final argument. Rather, they contend that the evidence of bias in TLC ALJ adjudications is strong enough to defeat defendants' cross-motion for summary judgment with respect to the suspension and revocation policy until further discovery is obtained. We begin first with plaintiffs' vagueness challenge.

Prior to imposing civil penalties for violation of a regulation, due process requires that the regulation be sufficiently specific to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972). The level of specificity required will vary depending on "the nature of the enactment." Village of Hoffman Estates v. Flipside, 455 U.S. 489, 498, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982). Generally speaking, courts will be more tolerant of vagueness if the penalty imposed by the statute is civil, rather than criminal or quasi-criminal, and if the statute does not threaten to interfere with constitutionally protected rights, such as free speech. Id. at 498-99. In the context of agency regulations, it is enough that "a reasonably prudent person, familiar with the conditions the regulations are meant to address and the objective the regulations are meant to achieve, has fair warning of what the regulations require." Rock of Ages Corp. v. Sec'y of Labor, 170 F.3d 148, 156 (2d Cir. 1999).

Section 2-61(a)(2) of the TLC Rules provides:

> [a] driver, while performing his duties and responsibilities as a taxicab driver, shall not commit or attempt to commit, alone or in concert with another, any willful act of omission or commission which is against the best interests of the public, although not specifically mentioned in these Rules.

35 RCNY § 2-61(a)(2). The TLC was established with the general purpose of "the continuance, further development and improvement of taxi and limousine service in the city of New York." N.Y.C. Charter § 2300. A taxicab driver should therefore understand the prohibition against "any willful act of omission or commission which is against the public interest" in the context of the TLC's purpose to, inter alia, establish service standards and ensure public access to quality taxi and limousine service. See Rock of Ages, 170 F.3d at 156 ("[A] reasonably prudent mine operator would take the Mine Act's objectives into account when determining its responsibilities to comply with a regulation promulgated thereunder."). Discriminatory service refusals, by definition, interfere with the TLC's objective of providing taxi and limousine service throughout New York City. Accordingly, a reasonably prudent taxicab driver, presumed to be familiar with TLC rules and TLC objectives, has more than fair warning that an unjustified denial of service is conduct against the specific public interests which the TLC was created to serve.

Given the deferential standard used to assess statutes that impose civil penalties for conduct that is not constitutionally protected, see Hoffman Estates, 455 U.S. at 498-99, the Court declines to hold § 2-61(a)(2) of the TLC Rules unconstitutionally vague as applied to

plaintiffs. n9 In so doing, the Court draws support from the conclusion already reached by the Appellate Division that the "public interest" standard used in TLC Rule 2-61(a)(2) is not unconstitutionally vague as applied to those who sexually harass passengers. See Fernandez v. New York City Taxi and Limousine Comm'n, 193 A.D.2d 423, 423, 597 N.Y.S.2d 337 (1st Dep't 1993).

Finally, plaintiffs claim that the TLC ALJs who conducted the suspension and revocation proceedings were biased. Due process requires a "fair trial in a fair tribunal." Withrow v. Larkin, 421 U.S. 35, 46, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975) (quoting In re Murchison, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955)). "Administrative agencies which adjudicate" are bound by this rule as well as courts. Id. A biased decision-maker renders the proceeding unconstitutional. Id. 421 U.S. at 47. There are a few situations, such as when the adjudicator has a pecuniary interest in the outcome of the case, where the Supreme Court has recognized that the risk of bias is strong enough that the proceedings will not satisfy due process. See id. (collecting cases). As a general rule, however, "those serving as adjudicators" are entitled to a "presumption of honesty and integrity." Id. Thus, it is not enough to show that the adjudicator is employed by the agency that investigates and prosecutes the cases that come before him. See, e.g., Donato v. Plainview-Old Bethpage Cent. Sch. Dist., 985 F. Supp. 316, 319 (E.D.N.Y. 1997) (fact that the hearing officer in a name-clearing hearing for a terminated assistant principal was employed by the school district and the Board of Education not enough to show bias). Plaintiffs can only overcome the presumption of honesty by showing that, "under a realistic appraisal of psychological tendencies and human weakness," the circumstances surrounding the

proceedings posed "a risk of actual bias or prejudgment" that would offend due process. Id.; see also Gibson v. Berryhill, 411 U.S. 564, 578, 93 S. Ct. 1689, 36 L. Ed. 2d 488 (1973) (noting that bias could arise from either "prejudgment of the facts or personal interest").

Plaintiffs maintain that the TLC ALJs were well aware of the TLC's desire to impose harsher punishment for service refusals and were receiving pressure to impose penalties of license suspension and revocation for first and second service refusal offenses. Plaintiffs draw the Court's attention to the memorandum sent on February 18, 2000, by Chief Administrative Law Judge Lisa Rana to the rest of the TLC ALJs concerning adjudication of service refusal cases under Operation Refusal. In the memorandum, ALJ Rana advised the TLC ALJs that taxi drivers who committed unjustified service refusals were being cited by TLC agents under both § 2-50 and under § 2-61(a)(2). See Memorandum of Chief Administrative Law Judge Lisa Rana, Baig Pls.' Mem. of Law in Supp., Ex. E ("Rana Memo"). ALJ Rana then stated the following:

Please be advised that, upon a finding of a refusal, the Commission's policy requires that both the Rule 2-50B and Rule 2-61A2 violations be sustained. Furthermore, where the Commission is seeking revocation in an Operation Refusal case, if the ALJ does find a violation of Rule 2-50B and Rule 2-61A2, the ALJ must submit to the Chairperson a recommended decision for the Rule 2-61A2 violation.

Rana Memo (emphasis in original). Plaintiffs maintain that this memorandum was designed to influence the fact-finding process of the TLC ALJs and to pressure the TLC ALJs to impose the heightened penalties that the TLC desired. Plaintiffs further assert that the TLC ALJs

were especially vulnerable to this pressure because ALJ Rana was in charge of assigning cases to TLC ALJs. Plaintiffs maintain that further discovery is needed to determine whether those ALJs that recommended the harsher penalties were assigned more cases and therefore paid more or whether the ALJs believed or had reason to believe that a recommendation of suspension or revocation would result in them being assigned more cases on the schedule.

The evidence of possible bias among TLC ALJs, while not overwhelming, is enough to defeat defendants' cross motion for summary judgment. The Rana Memo raises a legitimate question as to whether the TLC ALJs were finding violations of both rules based on the facts of the case, or whether they were "prejudging the facts" and merely tacking on a finding of liability under § 2-61(a)(2) and revoking licenses pursuant to the TLC policy. Indeed, plaintiffs point out that the ALJ's recommendation for defendant Padberg states simply, "With regard to the Rule 2-61A2 violation, it is the policy of the Commission that a finding of a service refusal is sufficient to establish that the respondent acted against the best interests of the public. Accordingly, I find and conclude that respondent is guilty of violating Rule 2-61A2." Aff. of John Padberg, Ex. 1. Furthermore, there is some evidence that TLC ALJs were recommending penalties of suspension and revocation in service refusal cases far more than OATH judges who handled the same cases. Taking the plaintiffs in this case as a sample, the OATH judges who adjudicated the cases of Ahmed, Baig, Kahn and Mahmood all recommended against license revocation, whereas the TLC ALJs who heard the cases of Padberg and Sultan both recommended revocation. n10 Given this evidence, the Court agrees with plaintiffs that genuine issues of fact remain and that plaintiffs have the right to reasonable and focused

discovery on the limited issue of potential systemic incentives and possible bias among the TLC ALJs.

D. Preliminary Injunction

The Baig plaintiffs seek a preliminary injunction (1) enjoining the TLC from continuing to summarily suspend taxicab licenses upon a charge of service refusal and ordering the return of licenses summarily suspended pursuant to this policy and (2) enjoining the TLC from suspending and revoking taxicab drivers licenses, after a hearing, for a first or second service refusal offenses and ordering the return of licenses already suspended or revoked pursuant to this policy. To qualify for preliminary injunctive relief, the Baig plaintiffs must show irreparable harm and "either (1) a likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of the hardships tipping decidedly in [their] favor." Jolly v. Coughlin, 76 F.3d 468, 473 (2d Cir. 1996) (internal quotation marks omitted).

We begin first with the Baig plaintiffs' two requests relating to the TLC summary suspension policy. As previously explained, the TLC's summary suspension practices violate due process. Clearly, then, the Baig plaintiffs have shown a likelihood of success on the merits. Moreover, the Second Circuit has recognized that the loss of a business constitutes irreparable harm. See Tom Doherty Assocs., Inc. v. Saban Entm't, Inc., 60 F.3d 27, 37 (2d Cir. 1995). Nevertheless, the Court need not grant preliminary injunctive relief to remedy any future continuation of the summary suspensions, as the TLC may not employ practices that the Court has found violate due process. On the other hand, plaintiffs whose licenses were summarily suspended and who have not

yet been granted a hearing on the merits are entitled to an injunction to have their licenses returned.

The harder question is whether a preliminary injunction should issue enjoining the second challenged practice – the suspension and revocation of licenses, after a hearing, for first and second service refusal offenses. As stated above, this practice does not violate substantive due process. Moreover, the Court continues to have doubts that plaintiffs will be successful on the merits of their procedural due process challenge to this practice. The rules relied on to invoke the penalty of suspension and revocation for first and second service refusal offenses are not unconstitutionally vague, and the only evidence of bias plaintiffs point to is the fact that adjudications on the merits of these charges take place before TLC ALJs. While the Court agrees with plaintiffs that they are entitled to discovery on this limited point, for preliminary injunction purposes, the Court remains unconvinced that plaintiffs will be able to overcome the strong presumption established in Withrow that those who serve as adjudicators are possessed of honesty and integrity. See Withrow, 421 U.S. at 47. Accordingly, preliminary relief enjoining the continued suspension and revocation of licenses for first and second service refusal offenses is denied.

CONCLUSION

For the foregoing reasons, plaintiffs' motion for summary judgment is granted with respect to their due process challenge to the TLC practice of summarily suspending taxicab licenses under Operation Refusal. Plaintiffs' motion for summary judgment is denied with respect to their due process challenge to the TLC practice of suspending and revoking taxicab licenses, after a hearing, for first and second service refusal

offenses. Defendants' cross-motion for summary judgment is granted with respect to all of plaintiffs' substantive due process claims and plaintiffs' vagueness challenge to 35 RCNY § 2-61(a)(2), but denied with respect to plaintiffs' procedural due process challenge to the suspension and revocation of licenses, after a hearing, for first and second service refusal offenses on grounds of possible bias among the TLC ALJs. This final claim is, therefore, the only one remaining before this Court.

Defendants are hereby ordered to return taxicab licenses that were summarily suspended pursuant to Operation Refusal to those drivers who have not yet received a determination on the merits.
The parties are directed to contact Magistrate Judge Gold to establish a discovery schedule.

SO ORDERED.
Dated: Brooklyn, New York
April 26, 2002
RAYMOND J. DEARIE
United States District Judge

FOOTNOTES

n1 The eleven justifications for a service refusal include:

(1) another passenger is already seated in the taxicab; (2) a hail from another person has already been acknowledged by the driver, and that other person is being picked up or is about to be picked up. Provided, however, that a driver shall not acknowledge the hail of a prospective passenger over the hail of another prospective passenger with an intent to avoid transporting the passenger whose hail was not acknowledged; (3) the passenger is carrying, or is in

possession of any article, package, case or container other than a wheelchair or other mobility aid, which the driver may reasonably believe will cause damage to the interior of the taxicab, impair its efficient operation, or cause it to become stained or foul smelling; (4) the driver is ending his workshift and has already illuminated the "Off duty" sign, locked both rear doors, and has indicated on the trip record that he is off duty and proceeding to his garage or home; (5) it is necessary to take the taxicab out of service for one of the reasons given in § 2-52(a) hereof, and the driver has already illuminated the "Off Duty" sign, made the appropriate trip record entry, and locked both rear doors; (6) the driver is discharging his last passenger or passenger prior to going off duty, and has already illuminated his "Off Duty" sign and made the appropriate trip record entry; (7) the passenger is escorting or accompanied by an animal which is not properly or adequately secured in a kennel case or other suitable container. This provision shall not apply to service animals accompanying people with disabilities; (8) the destination is within the counties of Nassau or Westchester, or Newark Airport, and the driver has been operating the taxicab for more than eight (8) hours of any continuous twenty-four (24) hour period; (9) the passenger is disorderly or intoxicated. Provided, however, that a driver shall not refuse to provide service to a person with a disability solely because such person's disability results in an appearance or involuntary behavior which may offend, annoy, or inconvenience the driver; (10) a driver has a position on the "long haul" line at an airport taxi stand and the passenger desires 'short haul" transportation and there is another taxicab available on the "short haul" line; or the driver has a position on the "short haul" line and the passenger desires "long haul" transportation and there is another taxicab available on the "long haul" line; or (11) if the passenger has refused a request by the

driver to obey the no-smoking requirement of law; the driver may discharge the passenger after asking the passenger to cease smoking in the taxicab, but if he does discharge the passenger it must be at a safe location.

35 RCNY § 2-50(e).

n2 Section 2-61(a)(2) states that "[a] driver, while performing his duties and responsibilities as a taxicab driver, shall not commit or attempt to commit, alone or in concert with another, any willful act of omission or commission which is against the best interests of the public, although not specifically mentioned in these Rules." 35 RCNY § 2-61(a)(2).

n3 Rule 8-16(c) specifically states:

The Commission shall notify the licensee either by personal service or by both first class and certified mail of the summary suspension, within five (5) calendar days of the suspension. If the licensee wishes to receive a hearing concerning the suspension, he or she may request a hearing within ten (10) calendar days of receipt of the notice of suspension. Upon receipt of a request for a hearing, the Commission shall schedule a hearing, which shall be held within (10) calendar days of the request, unless the Commission determines that such hearing will be prejudicial to any ongoing civil or criminal investigation.

35 RCNY § 8-16(c). These procedures are presumably based on the procedures outlined in § 19-512.1 of the Administrative Code, which are identical. See Admin. Code § 19-512.1.

n4 Although Clifford Paolillo is a named plaintiff in this claim, no facts regarding his claim have been provided.
n5 The nature of these summary suspension hearings is discussed in greater depth, infra.

n6 The Court notes for clarification that the hearings discussed in this section are not the "summary suspension hearings" referred to in the previous section, which the Court has determined violate plaintiffs' procedural due process rights. The hearings referred to in this section were hearings on the merits conducted by TLC ALJs.

n7 Plaintiffs' procedural due process claims regarding the adequacy of the suspension and revocation hearings are addressed infra.

n8 Plaintiffs cite Salahuddin v. Coughlin, 781 F.2d 24 (2d Cir. 1986) for the proposition that imposing penalties in excess of those authorized by state law constitutes a violation of due process. See id. at 27 n.4. That case involved a prisoner who was confined in a Special Housing Unit even though a court had granted his habeas corpus petition challenging that punishment. Although this Court observed in its opinion denying plaintiffs' motion for preliminary injunction that one could argue by analogy that revocation of a driver's license, when not authorized by state law could violate due process, see Padberg, 108 F. Supp. 2d at 185, the Court concludes that Salahuddin does not stand for the proposition that every violation of state law constitutes a violation of due process. As the Second Circuit itself stated in Salahuddin, "Every violation of state law is not a necessarily a denial of constitutional right." Salahuddin, 781 F.2d at 27 n.4.

n9 To the extent that plaintiffs are raising a facial challenge to § 2-61(a)(2), their claim must fail. A plaintiff whose conduct is proscribed by the statute may not bring a facial vagueness challenge. Hoffman Estates, 455 U.S. at 495 & n.7.

n10 It should also be noted that Operation Refusal's practice of pursuing service refusal offenders under both § 2-50 and § 2-61(a)(2) allowed the TLC to shift the adjudication of these cases from OATH judges to TLC ALJs. See 35 RCNY § 8-14(b) (rule violations that provide for discretionary penalties of license suspension and revocation, such as § 2-61(a)(2), may be tried before a TLC ALJ instead of OATH judges).

00 CV 3355

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

JOHN PADBERG, CLIFFORD PAOLILLO and RASHID AHMED, individually and on behalf of all others similarly situated,
Plaintiffs,

against

DIANE MCGRATH-MCKECHNIE, RUDOLPH W. GIULIANI, JOSEPH MCKAY, MATTHEW DAUS, HARRY RUBINSTEIN, ELLIOT SANDER, HARVEY GIANNOULIS, MARVIN GREENBERG, RAMONA WHALEY and THE NEW YORK CITY TAXI AND LIMOUSINE COMMISSION,
Defendants.

August 14, 2000, Decided

COUNSEL:
For plaintiffs: Daniel L. Ackman, Esq., Brad E. Mazarin, Esq., New York, NY.

For defendants: Jerald Horowitz, Esq., Assistant Corporation Counsel, New York, NY.

JUDGES:
RAYMOND J. DEARIE, United States District Judge.

OPINIONBY:
RAYMOND J. DEARIE

OPINION:

MEMORANDUM & ORDER

DEARIE, District Judge.

Plaintiffs John Padberg ("Padberg"), Clifford Paolillo ("Paolillo") and Rashid Ahmed ("Ahmed") bring this motion on behalf of themselves and a putative class of taxicab drivers, seeking a temporary restraining order and a preliminary injunction prohibiting defendant New York City Taxi and Limousine Commission ("TLC") from revoking Paolillo's and Ahmed's licenses, and directing TLC to reinstate Padberg's license. For the reasons set forth below, plaintiffs' motion is denied.

BACKGROUND

This case stems from TLC's highly publicized initiative aimed at eradicating racial bias from New York City's fleet of licensed taxicab drivers. Since November 1999, TLC has attempted to achieve the worthy objectives of removing from the streets any taxicab driver found to have refused service for racially motivated reasons, and deterring other drivers from engaging in similar, racially-based refusals. In pursuing these goals, TLC has imposed summary suspensions and severe penalties on many New York City taxicab drivers, including the three plaintiffs in this case, who now challenge TLC's procedures. As neither plaintiffs nor TLC sought the opportunity to present testimony or other evidence, the facts of this case are set forth below as they have been discerned from the parties' papers and from oral argument.

In 1996, TLC initiated Operation Refusal, a program to enforce its rules against all kinds of service refusals. As set forth in the § 2-50 (b) of the Taxicab Drivers Rules, "[a] driver shall not refuse by words, gestures or any other means ... to take any passenger to any destination

within the City of New York, the counties of Westchester or Nassau or Newark Airport." 35 RCNY § 2-50 (b). However, numerous complaints indicating pervasive non-compliance with this provision led to the development of Operation Refusal, which relies on undercover police officers and TLC agents who pose as prospective passengers attempting to hail taxicabs. These agents issue summonses to any driver who does not stop in response to their hails, or who refuses to take them to any requested destination as required by § 2-50 (b).

Sections 2-86 through 2-88 of the Taxicab Drivers Rules set forth the penalties for violations of TLC rules. Section 2-87 (a) (1) lists the mandatory penalties for service refusals: a first offense "shall be fined not less than $ 200.00 nor more than $ 350.00"; a second offense within two years "shall be fined not less than $ 350.00 nor more than $ 500.00," with the possibility, at the TLC Chairperson's discretion, of a suspension not to exceed thirty days; and a third offense within three years will result in the revocation of the taxicab driver's license. 35 RCNY § 2-87 (a) (1).

Discretionary penalties may also be imposed for service refusal. After listing the mandatory penalties, § 2-87 (a) (1) goes on to state that "nothing contained herein shall limit or restrict any other authority the Commission may have to suspend or revoke a driver's license." Similarly, § 2-88, provides that

violation of any of these rules [including § 2-50 (b)] may also lead to revocation or suspension of a taxicab driver's license and/or fines in excess of those set forth in the above rules 2-86 and 2-87, as provided in the "Procedures In The Event Of A Violation Of Commission Rules."

35 RCNY § 2-88. These procedures were described in the former § 2-85, which was repealed on December 31, 1999, and which stated that in addition to the mandatory revocation provided for violation [of § 2-50 (b), et al.,] the Commission may institute proceedings to revoke a taxicab driver's license for violation of any of these rules when in the determination of the Commission such a proceeding is warranted.

35 RCNY § 2-85 (h) (repealed 1999). Subsection (h) also specified that under these circumstances, special hearings would be held before administrative law judges ("ALJ"s) of the New York City Office of Administrative Trials and Hearings ("OATH").

On January 1, 2000, Title 35, § 8 of the Rules of the City of New York, which deals with adjudications, was amended to include some of the substance of the former § 2-85 (the "2000 Amendments"). Although § 8-03 (b), unlike § 2-85, makes no specific reference to service refusal or § 2-50 (b), it generally provides that "in the alternative to any specific penalties set forth in the Commission Rules, the Commission may, in its discretion, impose a penalty of license revocation, license suspension of up to six (6) months and/or a fine ..." 35 RCNY § 8-03 (b). Additionally, the 2000 Amendments made some changes to the adjudicative hearing process. While the former § 2-85 (h) had required all discretionary revocation hearings to be held before OATH ALJs, § 8-14 (b) requires OATH ALJs to hear only those cases in which "the Commission seeks the penalty of revocation for a rule violation not providing for discretionary or mandatory revocation as a penalty," pursuant to § 8-03 (b). 35 RCNY § 8-14 (b). All other revocation hearings may be heard by ALJs from TLC's own Adjudications Tribunal. See id.

The 2000 Amendments to the TLC rules were apparently intended to implement TLC's decision, made several months earlier, to crack down on service refusals motivated by racial bias. On November 11, 1999, defendant Diane McGrath-McKechnie ("McGrath-McKechnie"), Chairperson of TLC, declared racially-motivated service refusals to be actions against the public health, safety and welfare, thereby invoking her emergency authority, pursuant to the former § 2-85 (i) (repealed 1999) (now recodified as 35 RCNY § 8-16 (a)) to "order the summary suspension of [taxicab drivers' licenses], pending revocation proceedings." (Mazer Aff. P 7.)

Following this public announcement, TLC agents began to implement a newly invigorated Operation Refusal. They began to issue summonses to drivers charged with service refusals for violating, not only § 2-50 (b), but also § 2-61 (a) (2), which prohibits "any willful act of omission or commission which is against the best interests of the public." 35 RCNY § 2-61 (a) (2). As set forth in § 2-86, this provision carries with it the penalties of a $ 150-$ 350 fine and/or a suspension of up to thirty days, or revocation. Furthermore, TLC agents began to summarily suspend the licenses of these drivers, and to confiscate their cars for safekeeping, pending retrieval by drivers holding valid TLC licenses. The TLC agents execute the summary suspensions on the spot, according the taxicab drivers no prior notice or opportunity to be heard. TLC rules do provide for prompt post-suspension hearings. The exact nature of these hearings, however, is the subject of some confusion. Section 8-16 (b) of the TLC rules states that proceedings for license revocation "shall be initiated within five (5) calendar days of the summary suspension." 35 RCNY § 8-16 (b). These proceedings presumably include a full hearing on the merits before

an ALJ, and finally determine whether a driver's license will be revoked. But Section 8-16 (c) describes an alternative procedure, in which a taxicab driver can challenge the actual suspension, by requesting a hearing within five days of its occurrence. See 35 RCNY § 8-16 (c). This "summary suspension hearing" takes place within ten days of the driver's request, see id., and is conducted by an ALJ instructed to consider "relevant evidence and testimony under oath," 35 RCNY § 8-16 (d). What the "relevant evidence" consists of is not defined in this section, although at oral argument before the Court on June 29, 2000, counsel for TLC acknowledged that at a "summary suspension hearing," the ALJ does little more than check that the summons was issued properly, and review the taxicab driver's record for prior violations. (Tr. at 9, 16.) Additionally, while § 8-16 (d) permits the presentation of affirmative defenses set forth in New York City Administrative Code § 19-512.1, namely that the driver did not know or have reason to know of the acts on which the suspension is based, plaintiffs allege that they were not allowed to offer any evidence at their "summary suspension hearings."

Like the nature of the hearings, the duration of the summary suspension is also unclear. Section 8-16 (f) provides that following a "summary suspension hearing," the TLC Chairperson has sixty days to decide whether to uphold the summary suspension. If the Chairperson does not render a decision, then the suspension is lifted until such time as she does. See 35 RCNY § 8-16 (f). However, in the event that the Chairperson upholds the suspension, § 8-16 is silent as to how long the suspension may continue while the taxicab driver awaits his revocation hearing, or how long it may persist following a revocation hearing, pending the

Chairperson's decision whether to revoke the driver's license.

In the context of Operation Refusal and its complex regulatory scheme, TLC summarily suspended plaintiffs Ahmed's and Padberg's licenses. n1 The facts of their individual cases are set forth briefly below. n2

I. Rashid Ahmed

On December 2, 1999, Ahmed asked a prospective fare where he was going, even though he had already illuminated his "off duty" light. The passenger told Ahmed his destination, and Ahmed refused to take him. The passenger, a New York City police officer who was working undercover as part of Operation Refusal, issued Ahmed two summonses for violations of § 2-50 (b) (service refusal) and § 2-61 (a) (2) (acting against the best interest of the public). He summarily suspended Ahmed's license and confiscated his taxicab. Several days later, Ahmed had a "summary suspension hearing" during which, he alleges, he was not permitted to present any evidence, and where his suspension was upheld.

Almost three months later, Ahmed had a revocation hearing on the merits on February 24, 2000, before OATH ALJ McFaul. ALJ McFaul found that Ahmed had refused service for economic reasons, and recommended a fine of $ 300.00 pursuant to § 2-87 (a) (1), the mandatory penalty for a first violation of § 2-50 (b). McGrath-McKechnie has not yet rendered a final decision on Ahmed's case. Ahmed claims that his suspension has continued for seven months, while TLC contends that his suspension was lifted sixty days after the revocation hearing, pursuant to § 8-16 (f). Ahmed's license to operate taxicabs expired on May 31, 2000.

II. John Padberg

On February 15, 2000, TLC agents Alston ("Alston"), who is African-American, and Bonilla ("Bonilla"), who is Caucasian, conducted a sting operation as part of Operation Refusal. Alston and Bonilla positioned themselves on consecutive blocks, with Bonilla a block behind Alston. As Padberg approached, Alston, and immediately thereafter Bonilla, attempted to hail him. Padberg stopped for Bonilla, whereupon Alston issued Padberg two summonses for violations of 2-50 (b) and 2-61 (a) (2), summarily suspended his license and confiscated his car. At Padberg's "summary suspension hearing" on February 18, 2000, TLC ALJ Schwartz found that sufficient allegations of service refusal, combined with a prior record of violations, warranted the continuation of the suspension.

A revocation hearing was held before TLC ALJ Elliott on March 6, 2000. ALJ Elliott found that Padberg had refused service in violation of § 2-50 (b). Pursuant to TLC policy, Elliott found that the service refusal also constituted an act against the best interest of the public, in violation of § 2-61 (a) (2). Elliott therefore recommended revocation. In response to this recommendation, Padberg submitted a letter and character references to TLC on March 31, 2000. After reviewing Padberg's submissions, McGrath-McKechnie adopted the ALJ's recommendation on May 9, 2000, revoking Padberg's license. Padberg did not administratively appeal this ruling, and his time to do so expired on June 9, 2000.

DISCUSSION

Plaintiffs contend that TLC policies of summary suspension and license revocation for a first offense of

service refusal run afoul of 42 U.S.C. § 1983 by depriving them of property rights without due process. Plaintiffs further contend that the loss of their taxicab drivers' licenses works an irreparable injury upon them, and that they are therefore entitled to a preliminary injunction. TLC, however, maintains that plaintiffs have shown neither irreparable harm nor a likelihood of success on the merits of their claim, and that their motion for preliminary injunctive relief must consequently be denied.

It should be noted at the outset that neither Paolillo nor Ahmed is eligible for preliminary relief. As stated earlier, plaintiffs submit no information regarding Paolillo, and as such, the Court will not consider his motion at this time. Since Ahmed's taxicab driver's license has expired, he, too, cannot currently benefit from a preliminary injunction. Although Ahmed might conceivably reapply for a license, the record does not indicate that he has done so. Therefore, considering his motion now would be premature, and so, the remainder of this opinion will deal only with Padberg's claim.

I. Requirements For A Preliminary Injunction

The standards for obtaining a preliminary injunction are well established: a party must show (1) irreparable harm, and (2) either a likelihood of success on the merits of his claims, or else, sufficiently serious questions going to the merits to make them fair grounds for litigation, with the balance of hardships tipped in his favor. See, e.g., Jolly v. Coughlin, 76 F.3d 468, 473 (2d Cir. 1996).

A. Irreparable Harm

As an initial requirement for a preliminary injunction, a party must establish that, absent the injunction, he will suffer irreparable harm. See id. An irreparable harm is non-speculative, and cannot adequately be compensated through monetary damages. See Tom Doherty Assocs., Inc. v. Saban Entertainment, Inc., 60 F.3d 27, 37 (2d Cir. 1995). Generally, the Second Circuit has recognized any loss that threatens the continuing viability of a party's business as an irreparable harm. See id. at 37, 38.

Padberg contends that suspension and revocation of his license constitute irreparable harm, because without the license, he cannot operate his business or earn a living. TLC argues that Padberg will not suffer irreparable harm should an injunction not issue because he failed to administratively appeal his revocation.

TLC's argument, however, does not squarely address the issue of irreparable harm. Without doubt, depriving a taxicab driver of his license deprives him of his livelihood. And at this stage of these proceedings, the record before this Court does not indicate that Padberg has found gainful employment in another line of work. Thus the deprivation of his license imminently threatens his continued subsistence, an injury which is clearly non-speculative, and which could not be adequately compensated by a monetary award sometime in the distant future. Padberg's failure to exhaust his administrative remedies has no bearing on the harm he suffers as a result of being unable to operate his taxicab. While this fact might have more relevance to an argument -- which TLC does not make -- that this Court lacks subject-matter jurisdiction over Padberg's claim, it would not be dispositive in that context either, for in general, a litigant need not exhaust his administrative remedies before bringing a § 1983 action in federal

court. See Patsy v. Board of Regents, 457 U.S. 496, 516, 73 L. Ed. 2d 172, 102 S. Ct. 2557 (1982).

B. Showing On The Merits

Yet even in the face of undoubted irreparable harm, the Court will not issue a preliminary injunction unless Padberg makes some showing on the merits of his case. Generally, the party seeking preliminary relief will satisfy his burden if he shows either a likelihood of success on the merits, or alternatively, sufficiently serious questions going to the merits of his claims to make them fair ground for litigation, together with a balance of hardships tipping in his favor. See, e.g., Plaza Health Laboratories, Inc. v. Perales, 878 F.2d 577, 580 (2d Cir. 1989). But where a party "seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme," he must meet the more rigorous of the two standards. See id. TLC, an organ of the city government, has been summarily suspending and revoking licenses pursuant to authority claimed under Title 35 of the Rules of the City of New York ("Title 35"), and Title 19 of the New York City Administrative Code ("Title 19"). Additionally, as the parties have acknowledged, ending racially-motivated service refusals would surely benefit the public interest. As such, Operation Refusal constitutes governmental action taken in the public interest pursuant to a regulatory scheme, and so, Padberg must prove, at the least, that his § 1983 claims will likely succeed before he can obtain an injunction.

The determination that Padberg's proposed injunction would stay governmental action does not end the inquiry, however. Padberg may have to meet an even more rigid standard than "likelihood of success," since the injunction he seeks would direct TLC to reinstate his license, effecting a change in the relative positions of

the parties as they now stand. In two situations, a party seeking an injunction must show a clear or substantial likelihood of success on the merits of his claims. The first is when he seeks a "mandatory" injunction, that is, an injunction that changes the status quo; and the second is when he seeks an injunction that will provide him with substantially all the relief he requests, and which cannot be undone even if his adversary subsequently wins at trial. See Tom Doherty Assocs., 60 F.3d at 33-34. As Padberg will presumably ask for monetary damages to compensate him for the work he has already missed as a result of losing his license, an injunction will not provide him with substantially all the relief the seeks. Likewise, even if this Court orders TLC to reinstate Padberg's license, nothing prevents TLC from revoking it again in the wake of a victory at trial.

Nevertheless, Padberg's proposed injunction might still be considered "mandatory" since it would direct TLC to restore his license, in contrast with a standard "prohibitory" injunction which merely forbids a party from taking a certain action. However, as Abdul Wali v. Coughlin, 754 F.2d 1015 (2d Cir. 1985), makes clear, the status quo is a relative concept, and varies with the perspective from which it is viewed. See id. at 1025-26 (holding that an injunction directing the defendant to permit the delivery of a report to inmates in Attica was prohibitory in nature, even though the defendant had already prevented the report's delivery, and as such, the injunction changed the apparent status quo). Therefore, an injunction which orders a party to perform an action it should previously have performed may be characterized as prohibitory, since it does not change the status quo as it would have existed, absent that party's wrongful action. As the Second Circuit held in Johnson v. Kay, 860 F.2d 529, 541 (2d Cir. 1988), an injunction directing a union to pay for its president to

mail information concerning an upcoming referendum was non-mandatory, even though it forced the union to spend funds it could otherwise have saved, since "it only required the union to do what it should have done earlier -- open channels of communication to dissenting views ..." Similarly, in the case at bar, Padberg contends that TLC acted unlawfully in revoking his license. If so, then a preliminary injunction ordering his reinstatement would merely require TLC to do something it should have done earlier, or more precisely, to undo what it should not have done.

While at first blush, Jolly v. Coughlin, 76 F.3d 468 (2d Cir. 1996), might indicate that the injunction in question is mandatory after all, that case can be distinguished from the present one. In Jolly, a prisoner who was not permitted to leave his cell because he had refused a tuberculosis test for religious reasons sought a preliminary injunction releasing him from "medical keeplock" pending a trial on the merits of his claim. The Second Circuit held that the injunction was mandatory in nature, even though it could be viewed as prohibiting the defendants from continuing to confine the plaintiff in his cell. See id. at 474. That court was moved by the fact that the tuberculosis testing program which the plaintiff resisted had been in effect for four years, and that for three and a half of them, the plaintiff had been in keeplock. See id. In contrast, the TLC policies complained of in this case have only been in effect since November 1999 -- for less than one year; likewise, TLC revoked Padberg's license in May 2000, less than three months ago. Given that without TLC action, Padberg would still have his license, and given that he was deprived of his license only recently, the relevant status quo here is the one that existed before the revocation. Therefore, the injunction which Padberg seeks is

prohibitory, and is subject, as such, to the less stringent "likelihood of success" standard.

II. § 1983 Claims

To succeed on a § 1983 claim, a plaintiff must prove two elements: (1) that the defendant deprived him of a right protected by the Constitution or laws of the United States; and (2) that the defendant acted "under color of law." See 42 U.S.C. § 1983 (1994) (amended 1996); see also Adickes v. S.H. Kress & Co., 398 U.S. 144, 150, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970). Since TLC claims it revoked Padberg's license pursuant to Title 35 and Title 19, Padberg will clearly succeed in proving that TLC acted "under color of law." The only question is whether TLC deprived Padberg of "any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983.

At the outset, Padberg correctly asserts, and TLC does not dispute, that a taxicab driver's license is a property interest subject to the due process protections of the Fourteenth Amendment. In Bell v. Burson, 402 U.S. 535, 539, 29 L. Ed. 2d 90, 91 S. Ct. 1586 (1971), the Supreme Court accorded due process protection to a state driver's license, observing that "once licenses are issued ... their continued possession may become essential in the pursuit of a livelihood." This reasoning applies even more forcefully to a taxicab driver's license, since such a license cannot be distinguished from the business for which it is a necessary prerequisite. Not only is the license valuable, though, but it is also exclusive, for only Padberg may use it to operate his taxicab. Traditionally, exclusivity has been the hallmark of a property interest. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435, 73 L. Ed. 2d 868, 102 S. Ct. 3164 (1982). Furthermore, in the course of driving his taxicab,

Padberg has mixed his labor with the license; if that license could now be revoked without any procedural protections, then Padberg, together with all the other taxicab drivers on whom this city depends, would have less incentive to continue providing their valuable services.

Simply because the license is subject to constitutional protections, however, does not mean that any revocation of it will violate Padberg's Fourteenth Amendment rights. In this regard, Padberg advances three principal contentions: first, that the Rules of the City of New York do not authorize TLC to revoke his license for a first or second offense of service refusal, and as such, the revocation was illegal; second, that a biased TLC ALJ denied him a fair hearing; and third, that TLC summarily suspended his license without notice or an opportunity to be heard. TLC challenges Padberg's assertions, maintaining that the penalty of revocation for first-time offenders is authorized by the Rules, that there has been no showing of ALJ bias and that Padberg's "summary suspension hearing" provided him with adequate process to satisfy the Fourteenth Amendment's requirements.

A. Unauthorized Revocation

There is little doubt that Padberg has met the first requirement of a § 1983 claim, for if TLC had revoked his license without the requisite authority, then it would indeed have deprived him of a right secured by the Constitution. In Salahuddin v. Coughlin, 781 F.2d 24, 27 n.4 (2d Cir. 1986), the Second Circuit stated that "the infliction of punishment when not authorized by state law is a classic instance of denial of liberty without due process of law." In that case, prison officials returned the plaintiff to solitary confinement after a court had

granted his habeas corpus petition challenging that punishment. By analogy, a revocation of Padberg's license not authorized by Title 35 or Title 19 would deprive him of his property without due process.

However, Padberg's arguments have not convinced this Court that TLC lacks the authority to revoke a taxicab driver's license for a first or second offense of service refusal. Padberg contends that the mandatory penalties for service refusal set forth in § 2-87 (a) (1) are exclusive. But that section states explicitly that it does not "limit or restrict any other authority the Commission may have to suspend or revoke a driver's license," 35 RCNY § 2-87 (a) (1); thus, even on its face, the mandatory penalties which § 2-87 authorizes are non-exclusive. Moreover, as is clear from § 2-88 and former § 2-85, Title 35's regulatory scheme specifically contemplates discretionary license revocation as a penalty for a service refusal. See 35 RCNY § 2-88 (authorizing revocation and suspension for violations of § 2-50 "in excess of those set forth in the above rules 2-86 and 2-87..."); 35 RCNY § 2-85 (repealed 1999) (authorizing revocation for violations of § 2-50 in addition to mandatory penalties whenever TLC determines it is warranted). And after the 2000 Amendments were adopted, TLC gained the further authority to revoke or suspend licenses "in the alternative to any specific penalties set forth in the Commission Rules ..." 35 RCNY § 8-03 (b) (emphasis added). In light of these provisions, Padberg has clearly failed to establish a "likelihood of success" with respect to his argument that TLC may only revoke a taxicab driver's license for a third service refusal.

Padberg's other contention in this regard also fails to persuade the Court. Padberg states correctly that under traditional principles of statutory construction, where

two provisions purporting to cover the same matter are contradictory, the more specific will supplant the more general. He then claims that this principle requires the more specific § 2-50 (b) to displace the more general § 2-61 (a) (2) concerning the penalty for service refusals. However, "the mere existence of a specific statute carrying a lighter penalty" does not by itself undermine the applicability of a more general rule, "unless they cannot coexist independently." United States v. Bennerson, 616 F. Supp. 167, 174-5 (S.D.N.Y. 1985) (holding that a more specific statute prohibiting the concealment of stolen government checks did not partially repeal a more general statute forbidding the concealment of government property, and that the government could proceed against the defendant under either). Here, the penalty of discretionary revocation for a violation of § 2-61 (a) (2) does not conflict with the penalty scheme of § 2-50 (b), for as discussed above, the latter rule expressly provides that it does not limit TLC's considerable authority to impose discretionary revocation as a penalty for any violation. As such, § § 2-50 (b) and 2-61 (a) (2) do not contradict each other, making the principle of construction which Padberg invokes inapposite.

Furthermore, Padberg ignores another principle of statutory construction: insofar as possible, statutes which cover the same matter should be construed together. See Lower Manhattan Loft Tenants v. New York City Loft Bd., 66 N.Y.2d 298, 487 N.E.2d 889, 892, 496 N.Y.S.2d 979 (N.Y. 1985). In this case, § 2-61 (a) (2) arguably applies to service refusals; indeed, at oral argument, Padberg's counsel conceded that a racially-motivated service refusal implicates the "public welfare." (Tr. 10.) Since § 2-50 (b) and § 2-61 (a) (2) do not conflict, there appears to be no reason why TLC should not be permitted to penalize drivers who are

found to have refused service under either rule. Therefore, Padberg's claim that TLC has acted unlawfully in revoking his license pursuant to § 2-61 (a) (2) also fails to meet the "likelihood of success" standard.

B. Fair Hearing

Padberg is mistaken to suggest that his hearing before a TLC ALJ denied him due process. Padberg essentially claims that since TLC sought to revoke his license, ALJ Elliott, employed by TLC, could not have given him an unbiased hearing. But this issue was addressed in Withrow v. Larkin, 421 U.S. 35, 43 L. Ed. 2d 712, 95 S. Ct. 1456 (1975), in which the Supreme Court held that the same board of medical examiners could both investigate and punish a doctor charged with violations of its rules. Central to the holding in Withrow was the presumption that those who serve as adjudicators are possessed of honesty and integrity. See id. at 47. Padberg has provided no information to undermine this presumption with respect to ALJ Elliott, and as such, he has not established a likelihood of success with respect to this claim.

C. Summary Suspension

Padberg contends that summary suspension of his license deprived him of property without due process of law. TLC claims that the "summary suspension hearing" provided adequate process. This Court disagrees.
As a general rule, due process requires that an individual be given notice and an opportunity to be heard before he may be deprived of his property. See United States v. James Daniel Good Real Property, 510 U.S. 43, 48, 126 L. Ed. 2d 490, 114 S. Ct. 492 (1993) (holding that the ex parte seizure of the plaintiff's home pursuant to a civil

forfeiture statute providing no pre-seizure notice or opportunity to be heard violated the plaintiff's Fifth Amendment due process rights). However, exceptions to this rule do exist in the presence of "exigent" or "extraordinary" circumstances. See id. at 53. The analysis set forth in Mathews v. Eldridge, 424 U.S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976), has long guided courts in their efforts to define appropriate-due process protections, by requiring them to balance three factors: (1) the private interest affected by the official action; (2) the risk of erroneous deprivation of that interest in light of the procedures used, and the likely value of alternative procedural protections; and (3) the government's interest, including the administrative burden that additional procedural safeguards would impose. See id. at 335; James Daniel Good, 510 U.S. at 48.

Under the first Matthews factor, Padberg's affected interest is significant indeed. His taxicab driver's license is nothing short of his livelihood. Summary suspension works a deep invasion of his property, for it prevents him from earning a living. The Second Circuit has acknowledged that the continuation of a business is a fundamental interest subject to staunch due process safeguards. See United States v. All Assets of Statewide Auto Parts, 971 F.2d 896, 902, 905 (2d Cir. 1992) (holding that the ex parte seizure and shut down of the defendant's business pursuant to civil forfeiture proceedings without pre-seizure notice and opportunity to be heard violated the defendant's due process rights). Although the summary suspension is by nature temporary pending a full hearing on the merits, its impermanent nature, particularly under the circumstances now presented, does not significantly diminish the magnitude of the intrusion into Padberg's property interests. While it is true that the duration of a

deprivation must always be considered, see Mackey v. Montrym, 443 U.S. 1, 12, 61 L. Ed. 2d 321, 99 S. Ct. 2612 (1979), it is also true that even temporary deprivations can cause great injuries, and as such, will generally be subject to the due process requirements of pre-seizure notice and opportunity to be heard, see Fuentes v. Shevin, 407 U.S. 67, 84-85, 32 L. Ed. 2d 556, 92 S. Ct. 1983 (1972); see also, Bell v. Burson, 402 U.S. 535, 29 L. Ed. 2d 90, 91 S. Ct. 1586 (1971) (holding that when an uninsured driver was involved in an accident, suspension pending trial of his license without a pre-seizure hearing on the issue of liability violated his due process rights).

Traditionally, those cases in which courts have not required a pre-seizure hearing have dealt with deprivations of brief, or at least limited durations. See Mackey, 443 U.S. at 12 (suspension limited by statute to 90 days); Barry v. Barchi, 443 U.S. 55, 59, 61 L. Ed. 2d 365, 99 S. Ct. 2642 (1979) (fifteen-day suspension). But see Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 40 L. Ed. 2d 452, 94 S. Ct. 2080 (1974) (holding that exigent circumstances permitted the permanent governmental seizure of a yacht used in drug trafficking without a pre-seizure hearing); Plaza Health Laboratories, Inc. v. Perales, 878 F.2d 577 (2d Cir. 1989) (holding that exigent circumstances permitted termination of a medical lab from the Medicaid program, when the lab had been illegally dumping hazardous waste). In contrast, no limit seems to have been placed on Padberg's suspension. While § 8-16 (f) does require the TLC Chairperson to uphold or reverse a driver's suspension within sixty days of his "summary suspension hearing," once the Chairperson has decided to affirm a suspension, it seemingly can continue indefinitely. The Court is not aware of any regulatory

provision limiting the time period for TLC to schedule a final revocation hearing following the affirmation.

The second Mathews factor, the risk of erroneous deprivation, also weighs in Padberg's favor. TLC suspended Padberg's license based solely on the allegations of its inspectors. No neutral adjudicator was consulted, nor did Padberg have any meaningful opportunity to give his version of events. While the Mackey court held the sworn and corroborated affidavit of a police officer to be sufficient grounds for suspending the license of a suspected drunk driver who refused to take a breathalyzer test, see 443 U.S. at 14, that case is distinguishable from the one at bar. First, the statute which authorized summary suspension in Mackey required the police officer who witnessed the refusal to swear to the truth of his report, subjecting himself to possible civil and criminal liability. See id. Title 35 does not require any such sworn statement from TLC inspectors before they may summarily suspend a taxicab driver's license. Second, the defendant in Mackey had been arrested with probable cause for driving while under the influence of an intoxicant. While alcohol can be detected on a person's breath, and may have noticeable effects on his behavior, racial bias leaves no telltale signs. By this, the Court does not mean to suggest any dishonesty on the parts of inspectors Alston and Bonilla; indeed, an ALJ ultimately found their testimony credible at Padberg's revocation hearing. However, the inevitably subjective nature of the inquiry and the compelling objective of the investigative mission provides a formula for mistake and counsels caution. Whether a taxicab driver has failed to respond to a hail for racially-motivated reasons, or simply because he did not see it, will rarely be ascertainable in the absence of an impartial hearing.

A second problem with TLC procedures is the nature of the "summary suspension hearing." Prompt, post-deprivation hearings have, on occasion, sufficed for due process purposes. However, such post-seizure adjudications have been on the merits, and they have speedily followed the deprivations. For example, the Supreme Court in Mackey did not require a pre-seizure hearing, largely because a post-seizure review on the merits was available as early as the day following the suspension. See id. at 12, 13. And in Barry, 443 U.S. at 66, although the court did not require a hearing before the defendant suspended the plaintiff's horse trainer's license when his horse had tested positive for drugs, it nonetheless held the statute authorizing the suspension unconstitutional because it did not provide the trainer with a prompt, post-seizure hearing to fully and finally determine his liability. Section 8-16 (b) does provide for a full and final hearing on the merits within five days of suspension. See 35 RCNY § 8-16 (b). However, Padberg's "summary suspension hearing," pursuant to § § 8-16 (c) and (d), consisted merely of an ALJ verifying that his summonses were properly filled out, and examining his record for past violations. Padberg had to wait almost three weeks before he received a substantive hearing on the issue of whether he had actually refused service.

The highly subjective factual disputes which necessarily attend most determinations of service refusal, combined with the inadequacy of TLC's post-deprivation procedures, would have recommended the institution of additional pre-seizure safeguards in Padberg's case. Unlike Mackey or Dixon v. Love, 431 U.S. 105, 113-114, 52 L. Ed. 2d 172, 97 S. Ct. 1723 (1977) (holding that a pre-seizure hearing would not have reduced the risk of erroneous deprivation since the discretionary revocation of the plaintiff's truck driver's license was

based on three prior convictions of speeding within a four-year period, and the plaintiff could not challenge the validity of the convictions), a pre-seizure hearing might well have reduced the risk that Padberg's license would be erroneously suspended. Indeed, where deprivation has turned on the credibility of opposing testimony and on the strength of inferences drawn regarding a person's state of mind, courts have been far more likely to impose some type of pre-seizure protections, even where the untested evidence on its face appeared to justify the seizure. See James Daniel Good, 510 U.S. at 56, (holding that before seizing the plaintiff's house pursuant to a civil forfeiture statute authorizing seizure of property used in drug crimes, the government had to afford the plaintiff an opportunity to prove he was an innocent owner or that there was no probable cause for the seizure, even though he had already pled guilty to violating state drug laws). Padberg's revocation was ultimately based on an ALJ's decision to credit the testimony of TLC inspectors over Padberg's. But had the ALJ decided the opposite way, Padberg would have been needlessly deprived of his livelihood for three weeks.

Like the other two Matthews factors, the third – the government's interest, together with the administrative burden of additional procedural safeguards – also contributes to this Court's view that Padberg was entitled to pre-seizure notice and an opportunity to be heard. This does not belittle or contradict TLC's compelling interest in eradicating racial bias from its fleet of licensed taxicab drivers. Indeed, the evidence that some members of racial minorities, particularly African-American males, have difficulty in hailing taxicabs calls for an aggressive response, albeit one that is constitutionally sound. Nevertheless, an assessment of TLC's interest in the use of summary suspensions to

carry out its goal of ending racially-motivated service refusals leads to the conclusion that no "exigent" or "extraordinary" circumstances exist in this case to warrant relaxing due process protections.

Exigent circumstances exist when three requirements are met: (1) the seizure is carried out by a government official, pursuant to a narrowly-drawn statute; (2) it is necessary to secure an important public or governmental interest; and (3) there is a need for "prompt action." See Statewide Auto Parts, 971 F.2d at 903 (citing Fuentes, 407 U.S. at 91-92).

While this Court perceives the urgent need to remove racially-biased taxicab drivers from the street, it nevertheless finds that TLC has not demonstrated a need for "prompt action" as that phrase has been defined in the context of due process jurisprudence. Prompt action has been necessary where the government sought to seize highly mobile property; in Calero-Toledo, immediate seizure of a yacht was required to prevent it from sailing away. See James Daniel Good, 510 U.S. at 57 (construing Calero-Toledo, 416 U.S. at 679). In contrast, Padberg's license was unlikely to disappear. Like the house in James Daniel Good, it was not the kind of property that could abscond.

Prompt action has also been required to protect public health. In Mackey, 443 U.S. at 18, a failure to summarily suspend probable drunk drivers who refused to take breathalyzer tests would have endangered the public, undermined the state's efforts to prosecute offenders and remove them from the road. Public welfare, too, has created a need for prompt action. In Barry, 443 U.S. at 64-65, in the face of objective evidence that a horse had been drugged, the state quickly suspended the suspected trainer in order to preserve "the integrity of the racing carried on under its auspices," and to

"protect[] the public from harm ..." While the Barry court does not delve into the dangers that might have otherwise resulted from state inaction, it is clear, at least, that those who had already bet on the horse would suffer a virtually non-remediable financial loss. Additionally, had it permitted the trainer to continue working, the state ran the risk that he might drug another horse. This might further have served to undermine confidence in the horse racing industry, resulting in a concomitant loss of substantial state racing revenues.

As odious as they are, service refusals on racial grounds do not jeopardize life or public safety, or present the compelling circumstances present in Mackey or Barry. Rather, they are acts against the public welfare. This Court has found only one case arguably concerning an affront to the public welfare where prompt action was thought to be required. In Plaza Health, the state suspended Medicaid payments to a laboratory that had been indicted for illegally dumping medical waste. Plaza Health, however, may be distinguished from the present case in a number of ways. First, the Second Circuit was not certain that a property interest was even implicated by the suspension of the lab from the Medicaid program, see 878 F.2d at 581; by contrast, as shown above, a taxicab driver's license is undoubtedly property. Second, beyond any negative impact on public welfare caused by continued state patronage of a laboratory which had violated the law, the laboratory's action – dumping hazardous medical waste – additionally implicated the state's duty to protect public health. While acts against the public welfare are certainly bad in themselves, service refusals do not implicate the additional governmental responsibilities of protecting public health or safety. Finally, in deciding Plaza Health, the Second Circuit felt constrained by the Barry

decision. See id. at 583. But Barry has already been distinguished from the case at bar in many respects, so that its influence here is somewhat less than controlling. TLC nevertheless contends that summary suspension is necessary to deter other drivers who might refuse service. While the Mackey decision rested partially on this rationale, see 443 U.S. at 18, given the many other differences between the present case and Mackey, the deterrent effect, standing alone, is not sufficient to warrant the abrogation of standard due process procedures.

Furthermore, the administrative burden that a pre-suspension hearing would impose on TLC is slight at most, and perhaps non-existent. TLC rules already provide for a full and final revocation hearing on the merits within five days of the suspension, so long as a taxicab driver does not elect to have a "summary suspension hearing." See 35 RCNY § § 8-16 (b) – (d). Requiring TLC to provide the revocation hearing five days earlier, before taking away a driver's license, would result in no apparent additional cost. In fact, a pre-seizure hearing on the merits might well save TLC administrative costs. A hearing which fully and finally adjudicated all the issues prior to any deprivation would entirely obviate the need for a "summary suspension hearing." Drivers would then get only one hearing, while now they are having two.

For all of the above reasons, this Court finds that Padberg has indeed shown a likelihood of success on his § 1983 claim of deprivation of property without due process. In spite of this showing, however, he is still not entitled to a preliminary injunction. As the Second Circuit stated in Statewide Auto Parts, 971 F.2d at 905, "due process requires notice and the opportunity to be heard at a meaningful time." Like the plaintiff in

Statewide, Padberg has, at this point, had ample opportunity to be heard: he has had a full and fair revocation hearing on the merits, and he has had the opportunity, of which he did not avail himself, to appeal the ALJ's recommended penalty. Thus, while Padberg may ultimately prevail on his due process claim, he is not a candidate for preliminary injunctive relief.

CONCLUSION

For the foregoing reasons, this Court denies plaintiffs' motion for a temporary restraining order and preliminary injunction.

SO ORDERED.
Dated: Brooklyn, New York
August 14, 2000
RAYMOND J. DEARIE
United States District Judge

FOOTNOTES

n1 Although Clifford Paolillo is a named plaintiff in this action, no information has been presented regarding his claim.

n2 At oral argument, plaintiffs stated that they did not challenge the findings of the respective ALJs in the context of this motion. (Tr. at 4.) Nevertheless, the facts they presented in their papers were not consistent with those found by the ALJs. However, given the nature of plaintiffs' claims and the decision of this Court, the discrepancies are irrelevant for present purposes, and therefore the Court will set out the facts only as found by the ALJs.

No. 02-7903
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 23rd Day of April, two thousand three.

JOHN PADBERG, CLIFFORD PAOLILLO and RASHID AHMED, individually and on behalf of all others similarly situated,
Plaintiffs-Appellants,

v.

DIANE MCGRATH-MCKECHNIE, RUDOLPH W. GIULIANI, JOSEPH MCKAY, MATTHEW DAUS, HARRY RUBINSTEIN, ELLIOT SANDER, HARVEY GIANNOULIS, MARVIN GREENBERG, RAMONA M. WHALEY and NEW YORK CITY TAXI AND LIMOUSINE COMMISSION,
Defendants-Appellees.

A petition for panel rehearing and a petition for rehearing en banc having been filed from a summary order herein by appellants, John Padberg, Clifford Paolillo & Rashid Ahmed

Upon consideration by the panel that decided the appeal, it is ordered that said petition for rehearing is denied.

It is further ordered that the petitions for rehearing en banc have been transmitted to the judges for the Court in regular advice service and to any other judge that

heard the appeal and that no such judge requested that a vote be taken thereon.

FOR THE COURT
ROSEANN B. MACKECHINE

By:
Arthur Heller,
Administrative Attorney

03-282

No.

Supreme Court, U.S.
FILED
SEP 16 2003
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

JOHN PADBERG, CLIFFORD PAOLILLO, and RASHID AHMED, individually and on behalf of all others similarly situated,

Petitioners,

-against-

DIANE MCGRATH-MCKECHNIE, RUDOLPH W. GIULIANI, JOSEPH MCKAY, MATTHEW DAUS, HARRY RUBINSTEIN, ELLIOT SANDER, HARVEY GIANNOULIS, MARVIN GREENBERG, RAMONA WHALEY, AND THE NEW YORK CITY TAXI AND LIMOUSINE COMMISSION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

LEONARD J. KOERNER,*
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QUESTION PRESENTED

Did the United States Court of Appeals for the Second Circuit properly affirm the District Court's dismissal of Petitioners' substantive and procedural due process claims on summary judgment, where:

1) Petitioners failed to show that Respondent the New York City Taxi and Limousine Commission ("TLC") lacked authority to revoke taxi drivers' licenses for one or two unjustified service refusals, let alone that the challenged revocation policy constituted outrageously arbitrary government action; and

2) Petitioners failed to show that taxi drivers were unaware that one or two service refusals could trigger license revocation?

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

JOHN PADBERG, CLIFFORD PAOLILLO, and RASHID AHMED, individually and on behalf of all others similarly situated,

Petitioners,

-against-

DIANE MCGRATH-MCKECHNIE, RUDOLPH W. GIULIANI, JOSEPH MCKAY, MATTHEW DAUS, HARRY RUBINSTEIN, ELLIOT SANDER, HARVEY GIANNOULIS, MARVIN GREENBERG, RAMONA WHALEY, AND THE NEW YORK CITY TAXI AND LIMOUSINE COMMISSION,

Respondents.

BRIEF IN OPPOSITION

STATUTORY PROVISIONS

The Petition omits reference to the following statutes and rules, the full text of which may be found in the appendix hereto.

New York Civil Rights Law

Article 4, Section 40-e. Innkeepers and carriers refusing to receive guests and passengers

Administrative Code of the City of New York (the "Code")

Title 19, Chapter 5, Sections 505(*l*); 506; and 507(e)

Rules of the City of New York (the "Rules")

Title 35, Chapter 2, Sections 2-50; 2-61; 2-86; 2-87; 2-88; Chapter 8, Sections 8-03 and 8-14

STATEMENT OF THE CASE

A. Nature of the Case

Petitioners commenced this action on behalf of themselves and a putative class of New York City (the "City") taxi drivers, alleging that the following two TLC policies violated the Fourth, Fifth and Fourteenth Amendments of the United States Constitution, as well as Article 1, section 6, of the New York State Constitution: (1) the summary suspension of taxi drivers' licenses based upon unjustified passenger service refusals (the "summary suspension policy"); and (2) the suspension or revocation of taxi drivers' licenses, after a hearing, for first or second unjustified service refusals (the "suspension and revocation policy"). In addition to other relief, Petitioners sought reinstatement of all licenses suspended or revoked based upon "an allegation or finding of service refusal."[1]

---

[1] Contrary to Petitioners' assertion (Petition at 5), they never sought a declaration that the TLC "violat[ed] . . . 42 U.S.C. § 1983." Petitioners consistently refuse to acknowledge this Court's precedent that "one cannot go into court and claim a 'violation of § 1983' -- for § 1983 by itself does not protect anyone against anything." *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617 (1979).

As Petitioners admit (Petition at 12), only the suspension and revocation policy, pursuant to which the TLC revoked the taxi driver's license of Petitioner John Padberg ("Padberg") for having committed a race-based service refusal, is at issue on this Petition. Contrary to the Petition (at page 5), Petitioners Clifford Paolillo and Rashid Ahmed were unaffected by the suspension and revocation policy. Thus, Respondents do not address Petitioners' assertions regarding the summary suspension policy, all of which are irrelevant here.

B. Statement of Relevant Facts

1. The Taxi and Limousine Commission

Established by Chapter 65, section 2300 of the New York City Charter (the "Charter") for the purpose of "further development and improvement of taxi and limousine service in the City of New York," the TLC administers and enforces the City's licensing and regulatory system for taxis. The TLC's "jurisdiction, powers and duties" include "[t]he issuance, revocation, [and] suspension of licenses for [taxicab] drivers" and "[t]he formulation, promulgation and effectuation of rules and regulations reasonably designed to carry out the purposes, terms and provisions of this chapter." Charter §§ 2303 (5) and (11).

Code section 19-505(a) forbids anyone to drive a taxi in the City without a TLC taxi driver's license. Licensed taxi drivers must comply with TLC's Taxicab Drivers Rules, which are codified in Chapter 2 of the Rules. *See* Code § 19-505(k).

2. Service Refusals

The Rules forbid taxi drivers "to seek to ascertain the destination of a passenger before such passenger is

seated in the taxicab" or to "refuse by words, gestures or any other means, without justifiable grounds . . . , to take any passenger to any destination within the City of New York." Rules 2-50(a) and (b). Drivers who violate this Rule face mandatory minimum penalties ($250-$300 for a first service refusal, and $350-$500 for a second service refusal within two years), and – for three service refusals within three years – mandatory license revocation. Rule 2-87(a)(1); *see also* Code § 19-507(b)(1). However, Rule 2-87(a)(1) explicitly provides that "[n]othing contained herein shall limit or restrict any other authority the Commission may have to suspend or revoke a driver's license." *See also* Code § 19-505(*l*) (authorizing TLC to suspend or revoke licenses for any violation of the Code or Rules).

3. Conduct Contrary to the Best Interests of the Public

The Rules also forbid taxi drivers, while performing their duties and responsibilities, to "commit or attempt to commit, alone or in concert with another, any willful act of omission or commission which is against the best interests of the public, although not specifically mentioned in these Rules" Rule 2-61(a)(2). Under Rule 2-86, drivers who commit acts contrary to the best interests of the public may incur a penalty of "$150-350 and/or suspension up to 30 days or revocation."

4. The TLC's Discretionary Authority to Suspend or Revoke Licenses

The TLC retains discretion to suspend or revoke licenses for violations of any Code section or Rule. Code § 19-505(*l*); *see also* Rules 2-88, 8-03, and 8-14(a).

5. Suspension and Revocation Procedures

Under Rule 8-14(b), "[i]f the specific rule violation [the TLC] charge[s] provides for the discretionary penalty of revocation, the proceeding shall be commenced before the Commission Adjudications Tribunal and heard by an ALJ [administrative law judge]." In that event, the driver receives a written summons "detailing the charged misconduct and warning . . . that a finding of guilt could result in the revocation of his license," as well as information regarding the location, date and time of any scheduled hearing. Rule 8-14(c-e).

In revocation proceedings conducted by the TLC Adjudications Tribunal, the ALJ issues a Recommendation to the Chairperson "containing his findings of fact, conclusions of law and recommended penalties." Rule 8-14(h). Upon issuance of the ALJ's Recommendation, the driver has an "opportunity to provide a written response to said Recommendation, limited to the record of the hearing and the determination of the ALJ with respect to penalty only." Rule 8-14(i). The TLC Chairperson then considers the Recommendation, along with any written comments the driver may have submitted, and decides whether to accept, modify or reject the ALJ's Recommendation. Rule 8-14(j).

The driver may appeal the Chairperson's final decision to the full Commission. Rule 8-14(k). The TLC's final determination is subject to review in the New York State Supreme Court pursuant to Article 78 of the New York State Civil Practice Law and Rules.

Petitioners have never argued that the foregoing suspension and revocation procedures violate procedural due process.

6. Operation Refusal

In response to passenger complaints regarding service refusals, the TLC commenced "Operation Refusal" in 1996. As part of Operation Refusal, undercover police officers and TLC inspectors posing as passengers issue summonses to drivers who fail to stop for hails, or who refuse to travel to lawful destinations.

On November 11, 1999, the TLC Chairperson announced that service refusals threaten the public welfare. Accordingly, the TLC Chairperson directed Operation Refusal enforcement personnel to charge service refusals as violations of both Rule 2-50(b) (service refusal) and Rule 2-61(a)(2) (conduct contrary to the best interests of the public), and the TLC's Chief ALJ later directed TLC ALJs to treat service refusals as violations of both Rules.

During a subsequent radio address, Mayor Giuliani stated that because of "serious" and "prevalent" concerns regarding taxi drivers' race-based service refusals, he had directed the New York City Police Department and the TLC "to intensify their existing enforcement" of Operation Refusal. "The idea is to send out additional undercover officers to hail cabs," the Mayor explained, "and when cabbies don't stop [for minority passengers] . . . the officers will fine them, suspend their licenses, and take their cabs to a police precinct until it can be picked up."[2]

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[2] By admitting they "do not know how many cabbies Operation Refusal" supposedly "threw out of work" (Petition at 12), Petitioners contradict their earlier assertion that they are "among the hundreds" of taxi drivers whose hack licensees supposedly "were suspended without hearings and later revoked" (Petition at 5; see also *id.* at 1). Furthermore, (1) the TLC neither suspended nor revoked Petitioner Paolillo's hack license; and (2) the TLC

On November 10, 1999, the TLC notified taxi drivers of the TLC's enforcement initiative. In addition to reciting other penalties for service refusals, the notice cautioned that the TLC "may, in its discretion, seek the penalty of revocation of the driver's license for any and all appropriate rule violations" (C.A. App. 229).[3] Petitioners' summary of the notice omits the quoted language (Petition at 8-9, 18, 20).

As show below (at pages 16-18), Petitioners are wrong to claim that the TLC Commissioners rejected the suspension and revocation policy (Petition at 10-11).[4]

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suspended, but never revoked, Petitioner Ahmed's hack license. Finally, Petitioners have never challenged the TLC's statement that taxi drivers who lose their licenses under the suspension and revocation policy may seek reinstatement after one year (Resp. Br. at 19 n.12).

[3] Unless otherwise indicated, (1) numbers in parentheses preceded by "C.A. App." refer to pages in the Joint Appendix filed with the Second Circuit; and (2) numbers in parentheses preceded by "A" refer to pages in the Appendix to the Petition.

[4] Petitioners also mischaracterize the April 2000 correspondence between the TLC Chairperson and OATH Chief ALJ Rubin (Petition at 11). In her letter, the TLC Chairperson clarified OATH's authority to recommend license revocation for first-time service refusals and, citing a TLC ALJ's recommendation of license revocation as the penalty for a service refusal, requested reconsideration of the recommended non-revocation penalty in several OATH cases (C.A. App. 59-62). Judge Rubin responded that she lacked authority to direct OATH Administrative Law Judges to reconsider their recommendations (C.A. App.

7. Revocation of John Padberg's License

On February 15, 2000, a TLC Inspector issued two summonses to Petitioner John Padberg ("Padberg"), one for refusing service on the basis of race (in violation of Rule 2-50(b)), and another for committing an act against the best interests of the public (in violation of Rule 2-61(a)(2)).

During a subsequent TLC administrative hearing, TLC Inspectors Alston (who is black) and Bonilla (who is white) testified that although they hailed Padberg's cab virtually simultaneously, Padberg drove past Inspector Alston and stopped for Inspector Bonilla. Padberg claimed that he saw Inspector Bonilla hail him first, failed to notice Inspector Alston until he drove through the intersection where Inspector Alston stood, and was uncertain as to whether Inspector Alston was trying to hail him.

The ALJ credited the TLC Inspectors' "credible and consistent testimony" that Padberg ignored Inspector Alston's hail and bypassed him to stop for Inspector Bonilla, but discredited Padberg's testimony. Accordingly, the ALJ determined that Padberg violated Rules 2-50(b) and 2-61(a)(2). After reviewing Padberg's TLC violation history (including "repeated passenger harassment and abuse and service refusals") and DMV driving record (indicating an accumulation of 10 points for "passing red lights, disobeying traffic devices and making an improper turn"), the ALJ recommended license revocation.

Padberg received a copy of the ALJ's Recommendation and, through counsel, submitted a letter and character references to the TLC. After reviewing Padberg's submissions, the TLC Chairperson accepted the

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63). In any event, Judge Rubin added, the TLC was free to reject OATH ALJ penalty recommendations (*id.*).

ALJ's Recommendation and revoked Padberg's license. Under Rule 8-14(k), Padberg could have appealed the TLC Chairperson's decision to the full Commission, but failed to pursue such an administrative appeal before his right to do so expired on June 9, 2000.

8. Procedural History

After commencing this action, Petitioners moved by order to show cause for a temporary restraining order and preliminary injunction prohibiting the TLC from enforcing the suspension and revocation policy, *inter alia*, and directing the TLC to reinstate Padberg's license. During oral argument on Petitioners' motion, their counsel admitted that service refusals affect the public welfare (C.A. App. 91, 103).

By Memorandum and Order (one paper) entered August 14, 2000 (the "August 14 Order"), and reported at 108 F. Supp. 2d 177 (E.D.N.Y. 2000), the District Court denied Petitioners' motion (A55-81). With respect to the TLC's suspension and revocation policy, Petitioners failed to persuade the District Court that the TLC lacked authority to revoke a hack license for a first or second service refusal (A69-72).[5]

Subsequently, Petitioners moved, and Respondents cross-moved, for summary judgment. To support their motion, Petitioners argued that the suspension and

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[5] Citing *Salahuddin v. Coughlin*, 781 F.2d 24, 27 n.4 (2d Cir. 1986), the District Court explained that an unauthorized revocation of Padberg's license "would deprive him of his property without due process" (A69-70). Thus, Petitioners are wrong to assert (at page 14 n.2 of the Petition) that the District Court "never mentioned the concept" of substantive due process in the April 14 Order.

revocation policy violated due process because, *inter alia*, (i) Mayor Giuliani and the TLC Chairperson allegedly implemented the policy without the Commission's formal approval; (ii) the Code supposedly prohibits license revocations for first and second service refusals; and (iii) Rule 2-61(a)(2), which prohibits conduct adverse to the public interest, is somehow unconstitutionally vague. As purported support for their arguments, Petitioners cited substantive due process rules from *Salahuddin*, 781 F.2d at 27 n.4, and *Bello v. Walker*, 840 F.2d 1124, 1129 (3d Cir.), *cert. denied*, 488 U.S. 868 (1988).

In opposition, and in support of Respondents' cross-motion for summary judgment, Respondents contended that under Charter section 2301(c), which authorizes the TLC Chairperson to "assign and superintend the duties of such officers and employees as may be necessary to carry out the provisions of this chapter," the TLC Chairperson properly directed TLC personnel to respond more forcefully to service refusals.

Respondents further contended, *inter alia*, that Code section 19-505(*l*) – authorizing the TLC to suspend or revoke licenses for any violation of the Code or Rules – permitted the TLC to revoke a driver's license even for a first service refusal.

C. District Court's Opinion and Order

In its April 29, 2002 Memorandum and Order (one paper) resolving the parties' motions for summary judgment (A4-54) (the "April 29 Order"), the District Court, after ruling that the TLC's summary suspension policy violated Petitioners' procedural due process rights (A23-34), considered Petitioners' challenges to the TLC's suspension and revocation policy (A34-48). To the extent Petitioners disputed the authority of the Mayor, the TLC Chairperson, and the TLC to suspend or revoke licenses for

a first or second service refusal, the District Court applied substantive due process analysis (A34-42). With respect to Petitioners' vagueness challenge, however, the District Court applied procedural due process rules (A42-45).[6]

The District Court reasoned that because Charter section 2301(c) at least arguably authorized the TLC Chairperson to promulgate enforcement policies without a full Commission vote, her conduct may have been "incorrect" or "ill-advised," but it was not unconstitutional (A37-38). "Nor is it entirely clear," the District Court added,

> that [the] Chairperson['s] understanding of her own authority was incorrect. Plaintiffs have provided no authority, other than the language of the . . . Charter itself, supporting the proposition that the Chairperson needed the vote of the Commission to promulgate an enforcement policy such as Operation Refusal. With only the language of the Charter to follow, the Court cannot say with certainty that [the] Chairperson['s] actions were even unauthorized, much less that they were arbitrary in the constitutional sense.

(A37-38).

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[6] Because Petitioners had relied upon substantive due process rules in their supporting memorandum (see page 9 above), they are wrong to accuse the District Court of invoking substantive due process standards *sua sponte* (Petition at 14). Indeed, the District Court explicitly referenced and rejected Petitioners' substantive due process argument (A34-35, 53).

Furthermore, the District Court noted, nothing suggested that either Mayor Giuliani or the TLC Chairperson "were prompted to act by anything but legitimate motives" (A38):

> Both were attempting to rectify the problem of race-based service refusals among taxicab drivers by increasing the penalties imposed for such an infraction. Plaintiffs' bare allegation that Mayor Giuliani initiated this new enforcement program in response to a highly publicized complaint in order to further his own political purposes, if credited, does not render the conduct a gross abuse of government authority. The Mayor was responding to a matter of public concern.

(A38).

"In sum," the District Court determined, "these are not the type of egregious government actions that offend substantive due process" (A38).

Similarly, the District Court held, because Code section 19-505(*l*) and Rule 2-61(a)(2) at least arguably authorize license suspension and revocation for first and second service refusals, the TLC's suspension and revocation policy "was not arbitrary or irrational and therefore did not violate substantive due process" (A38-42).

Finally, the District Court rejected Petitioners' procedural due process challenges to Rule 2-61(a)(2), which prohibits conduct adverse to "the best interests of the public" (A42-45). Because "a reasonably prudent taxicab driver, presumed to be familiar with TLC rules and TLC objectives, has more than fair warning that an unjustified

denial of service is conduct against the specific public interests the TLC was created to serve," the District Court reasoned, Rule 2-61(a)(2) is not unconstitutionally vague as applied to Petitioners (A44-45).

For these reasons, the District Court granted Respondents' cross-motion for summary judgment as to Petitioners' substantive due process challenge to the suspension and revocation policy, and as to Petitioners' vagueness challenge (A50).

D. The Opinion of the United States Court of Appeals for the Second Circuit

Affirming the April 29 Order, the Second Circuit determined that (1) the relevant "regulations can reasonably be read to permit the imposition of license suspension or revocation" for a first or second service refusal; and (2) the Charter "can reasonably be read to grant the [TLC] Chairwoman power to carry out the regulations on her own," *i.e.*, without a TLC Commission vote (A2-3). "Because a reasonable, though arguably incorrect, interpretation of the city regulations supports the Chairwoman's actions," the Second Circuit then held, citing *Interport Pilots Agency, Inc. v. Sammis*, 14 F.3d 133, 145 (2d Cir. 1994), "these actions were not 'arbitrary or irrational' and therefore do not give rise to a constitutional violation" (A3).

The Second Circuit also affirmed the District Court's rejection of Petitioners' vagueness challenge, because taxi drivers had fair notice that service refusals constituted conduct adverse to the best interests of the public, and therefore violated both Rule 2-50(b) (service refusals) and 2-61(a)(2) (best interests) (A3).

REASONS FOR DENYING THE PETITION

A. Petitioners have Failed to Raise any "Certworthy" Issues for this Court's Review.

Petitioners never argue that the Second Circuit's decision (1) conflicts with the decision of any other federal appellate court; (2) conflicts with any decision by a state court of last resort; (3) "so far depart[s] from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power"; (4) resolves an important federal question that this Court should resolve; or (5) resolves an important federal question "in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10. Rather, Petitioners merely (and incorrectly) argue that the Second Circuit misapplied the law. Accordingly, this Court should deny the Petition.

B. The Second Circuit Properly Rejected Petitioners' Substantive Due Process Claims

Nothing in the Petition undermines the Second Circuit's rationale for rejecting Petitioners' substantive due process claim: (1) the Charter and relevant regulations "can reasonably be read" to authorize the suspension and revocation policy; and (2) the TLC's rational, non-arbitrary legal interpretations do not violate Petitioners' substantive due process rights (A3). *See, e.g., Bishop v. Wood*, 426 U.S. 341, 350 (1976) (due process clause "is not a guarantee against incorrect or ill-advised [government] decisions"); *Kaluczky v. City of White Plains*, 57 F.3d 202, 211 (2d Cir. 1995) ("Substantive due process protects against government action that is arbitrary, conscience shocking, or oppressive in a constitutional sense, but not against government action that is 'incorrect or ill-advised.'"); *Interport*, 14 F.3d at 144-45 (because it was neither arbitrary nor irrational, Board of Commissioners'

erroneous policy statement did not violate substantive due process).[7]

As an initial matter, this Court should reject Petitioners' attempt to criticize the Second Circuit and the District Court for rejecting Petitioners' arguments on substantive due process grounds (Petition at 14 & n.2, 16-18). Contrary to Petitioners' revisionist history (Petition at 14 & n.2), they commenced this action challenging the suspension and revocation policy as lacking a "legal, statutory or regulatory basis and depriv[ing] taxi drivers of their property without due process of law" (C.A. App. 14 [¶1]; C.A. App. 20 [¶27]). Similarly, in support of their summary judgment motion, Petitioners cited substantive due process rules from *Salahuddin*, *Bello*, and *Monroe v. Pape*, 365 U.S. 167 (1961). Proceeding to frame the key issue in this case as one of substantive due process, Petitioners asked "whether defendants had legal authority" to revoke hack licenses.

Thus, Petitioners attacked the suspension and revocation policy (albeit without justification) on substantive due process grounds. *See, e.g., Sameric Corp. v. City of Philadelphia*, 142 F.3d 582, 594 (3d Cir. 1998) (applying substantive due process rules to reject claim that city exceeded its authority when designating theater as an historic building). Accordingly, the Second Circuit and District Court properly invoked substantive due process when rejecting Petitioners' arguments.

Despite attempting to disavow their substantive due process claim, Petitioners unjustifiably criticize the Second Circuit's decision on substantive due process

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[7] Notwithstanding the Second Circuit's reliance on *Interport* (A3), Petitioners fail to cite it, let alone attempt to distinguish it.

grounds. Repeating twice-rejected legal arguments, Petitioners claim that (1) the full TLC Commission "never voted" on the suspension and revocation policy (Petition at 18-21); and (2) the mere (alleged) illegality of the suspension and revocation policy supposedly violates Petitioners' constitutional rights. These arguments fail.[8]

1. The Charter Authorized Implementation of the Suspension and Revocation Policy without a Full Commission Vote.

For several reasons, Petitioners' "voting" argument lacks merit. First, as the Second Circuit and the District Court held, the Charter at least arguably authorized TLC Chairperson to implement the suspension and revocation policy without a full Commission vote.

Charter section 2301(c) authorizes the TLC Chairperson to "superintend" the duties of TLC officers and employees "as may be necessary to carry out the provisions" of Charter Chapter 65, which calls for "development and improvement of taxi . . . service," "promotion and protection of the public comfort and convenience," and the establishment of "standards of service," *inter alia.* Charter § 2300; *see also* Charter § 2303(b)(2, 5, 10).

Consistent with these provisions, the TLC promulgated Rule 2-50(b) (service refusals), Rule 2-

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[8] In Petitioners' view, the alleged illegality of the suspension and revocation policy somehow violates section 1983 (Petition at 21-26). Because section 1983 "does not provide a remedy for abuses that do not violate federal law," *Collins v. City of Harker Heights*, 503 U.S. 115, 119 (1992), we construe Petitioners' argument as implicating substantive due process.

61(a)(2) (best interests), as well as penalties for Rule violations. The TLC Chairperson then exercised her superintendent authority by directing TLC officers and employees to enforce Rule 2-50(b) by treating service refusals as conduct adverse to the best interests of the public. As Petitioners never dispute, administrative officials may exercise statutorily-given administrative discretion, guided by "reasonably practicable" standards, to execute the law. *Levine v. Whalen*, 39 N.Y.2d 510, 515 (1976); *Barton Trucking Corp. v. O'Connell*, 7 N.Y.2d 299, 307 (1959). Having conceded that service refusals affect the public welfare, Petitioners' counsel must concede the rationality of the TLC Chairperson's exercise of administrative discretion.

Indeed, Petitioners fail to cite any authority to support their view that, even though the Charter, Code and Rules authorize license revocation after one service refusal, the Charter required the TLC Chairperson to submit the suspension and revocation policy to a full Commission vote.[9]

Thus, as the Second Circuit held, the Charter can reasonably be read to authorize the TLC Chairperson's implementation of the suspension and revocation policy without a full TLC Commission vote.

This Court should also reject Petitioners' attempt to establish a substantive due process violation by speculating, contrary to fact, that a majority of TLC Commissioners would have voted to reject the suspension and revocation policy (Petition at 19).

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[9] Nor do Petitioners cite any authority to support their assertion (Petition at 20) that the TLC Chairperson should have abandoned the suspension and revocation policy merely because some OATH judges disagreed with it.

Belying Petitioners' speculation, the TLC Commission voted unanimously, in May 2000, to revoke the license of taxi driver Jung Park pursuant to the suspension and revocation policy. The Commission voted to revoke Park's license notwithstanding an OATH ALJ's erroneous determination that the Code forbids license revocation for one service refusal (C.A. App. 52-58, 69).

Petitioners are also wrong to assert that the TLC Commissioners "rejected the chairwoman's edict" during a July 2000 hearing (Petition at 19). Rather, the TLC Chairperson noted the TLC's authority to revoke licenses after one service refusal (C.A. App. 353, 367); one Commissioner questioned the TLC's authority to do so (C.A. App. 353-59); Commissioner Arout, who acknowledged his lack of legal training, expressed confusion over how to apply Code section 19-507(b)(1) (service refusal penalties) (C.A. App. 343-44); and three Commissioners expressed their willingness to revoke a license after one service refusal (C.A. App. 344, A367).

Thus, Petitioners' factually-contradicted speculation about the TLC Commission is insufficient to manufacture a substantive due process violation.

2. Merely Unauthorized Governmental Conduct does not Violate Substantive Due Process.

Even assuming the Charter required a full TLC Commission vote, the TLC's implementation of the suspension and revocation policy still did not violate substantive due process.

As this Court held in *Snowden v. Hughes*, 321 U.S. 1, 11, *reh'g denied*, 321 U.S. 804 (1944) "[m]ere violation of a state statute does not infringe the federal Constitution." *See also Paul v. Davis*, 424 U.S. 693, 700 (1976) ("Violation of local law does not necessarily mean that

federal rights have been invaded."), *reh'g denied*, 425 U.S. 985 (1976).[10]

Numerous federal appellate courts have heeded this Court's reluctance to transform state-law transgressions into constitutional violations. *See, e.g., Natale v. Ridgefield*, 170 F.3d 258, 262 (2d Cir. 1999) ("Arbitrary conduct that might violate . . . state law is not sufficient to demonstrate conduct so outrageously arbitrary as to constitute a gross abuse of governmental authority that will offend [substantive due process]."); *Midnight Sessions, Ltd. v. Philadelphia*, 945 F.2d 667, 684 (3d Cir. 1991) ("federal courts do not sit in federal question cases to grant remedies for mere violations of state law"), *reh'g denied en banc*, 1991 U.S. App. LEXIS 25678 (3d Cir., Oct. 28, 1991), *cert. denied*, 503 U.S. 984 (1992); *Chiplin Enter., Inc. v. Lebanon*, 712 F.2d 1524, 1528 (1st Cir. 1983) ("'even the outright violation of state law by local officials . . . does not automatically raise" a substantive due process claim).

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[10] Petitioners' misplaced reliance (at page 23 of the Petition) on *FCC v. Next Wave Person Communications*, 537 U.S. 293 (2003), and *SEC v. Sloan*, 436 U.S. 103 (1978), reflects a fundamental misunderstanding of constitutional law, federal administrative law, and state law. Federal agency violations of the Administrative Procedure Act have no bearing on alleged municipal agency violations of substantive due process rights. *Cf. Harlen Assocs. v. Inc. Vill. of Mineola*, 273 F.3d 494, 505 (2d Cir. 2001) (substantive due process forbids only "outrageously arbitrary" conduct constituting "a gross abuse of governmental authority," rather than "governmental actions that might fairly be deemed arbitrary or capricious and for that reason correctable in a state court lawsuit" (quoting *Natale*, 170 F.3d at 263).

Although "outrageously arbitrary" government action may violate substantive due process, *Natale*, 170 F.3d at 262, Petitioners have failed to show that the TLC Chairperson's implementation of the suspension and revocation policy met that standard. Thus, even assuming the policy was unauthorized without a full Commission vote, Petitioners have failed to establish a substantive due process violation.

Tacitly conceding this point, Petitioners argue that unauthorized governmental *policies* – as opposed to "random and unauthorized acts by particular officials" – somehow violate the Constitution, regardless of whether they meet the "outrageously arbitrary" standard (Petition at 22-23). Again, Petitioners are wrong.

First, this Court has held that "in a due process challenge to executive action, the threshold question is whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Sacramento v. Lewis*, 523 U.S. 833, 847 n.2 (1998). *See also Interport Pilots Agency, Inc. v. Sammis*, 14 F.3d 133, 144-45 (2d Cir. 1994). Petitioners fail to cite any authority to support their competing view that this Court's "threshold question" is inapplicable to the TLC Chairperson's implementation of the suspension and revocation policy.

Moreover, Petitioners are wrong to assert that "this Court has never invoked substantive due process where a considered policy is involved" (Petition at 22). This Court routinely applies substantive due process standards to determine the constitutionality of "considered policies," such as statutes, regulations, and rules. *See, e.g., Daniels v. Williams*, 474 U.S. 327, 331 (1986) ("Historically, this guarantee of due process has been applied to deliberate decisions of government officials to deprive a person of life, liberty, or property"); *Kelley v. Johnson*, 425 U.S. 238,

247-48 (1976) (applying substantive due process standards to determine constitutionality of police department regulation regarding officers' hair-grooming standards).

When statutes, regulations and rules are at issue, however, the relevant substantive due process test is different: whether the challenged enactment bears a rational relationship to a legitimate government goal. *See, e.g., Kelley*, 425 U.S. at 247-48 (respondent failed to "demonstrate that there is no rational connection between the regulation . . . and the promotion of safety of persons and property"); *Interport*, 14 F.3d at 144-45. Even assuming the applicability of the "rational relationship" test here, Petitioners fail to argue, let alone show, that revoking hack licenses is rationally unrelated to the legitimate goal of reducing unjustified service refusals. Indeed, unjustified service refusals constitute misdemeanors under Article 4, section 40-e of the New York Civil Rights Law, and Petitioners' counsel has conceded that service refusals affect the public welfare (C.A. App. 91, 103).

Thus, Petitioners have failed to undermine the Second Circuit's rejection of their substantive due process arguments.

C. The Second Circuit Properly Rejected Petitioners' Procedural Due Process Claim.

This Court should also reject Petitioners' new and flawed procedural due process claim (Petition at 17), which is nothing more than a rephrasing of Petitioners' rejected vagueness challenge.

In addition to attacking the suspension and revocation policy on substantive due process grounds, Petitioners criticized the policy as unconstitutionally vague, because Rule 2-61(a)(2) forbids conduct adverse to the best interests of the public, rather than service refusals *per se*.

The Second Circuit and District Court properly rejected Petitioners' vagueness challenge, because drivers had fair notice that service refusals constituted conduct adverse to the best interests of the public, and therefore violated both Rule 2-50(b) (service refusals) and 2-61(a)(2) (best interests) (A3).

Petitioners now argue that the suspension and revocation policy violated drivers' procedural due process rights because drivers supposedly never received notice that one service refusal could result in license revocation (Petition at 17-18). This is false.

First, Rule 2-87(a)(1), which sets forth the penalties for service refusals, explicitly provides that "[n]othing contained herein shall limit or restrict any other authority the Commission may have to suspend or revoke a driver's license." *See also* Code § 19-505(*l*) (authorizing TLC to suspend or revoke licenses for any violation of the Code or Rules).

Moreover, on November 10, 1999, the TLC posted a notice "at TLC offices and taxi garages around the City" listing the penalties for service refusals (Petition at 8-9). The portion of the notice Petitioners fail to mention reminded drivers that the TLC "may, in its discretion, seek the penalty of revocation of the driver's license for any and all appropriate rule violations" (C.A. App. 229).

Furthermore, when rejecting Petitioners' vagueness challenge to Rule 2-61(a)(2) (best interests), the Second Circuit and District Court correctly noted that drivers had fair notice that service refusals constituted conduct adverse to the best interests of the public, and therefore violated both Rule 2-50(b) (service refusals) and 2-61(a)(2) (best interests) (A3). Petitioners cannot defeat these findings by restating their rejected vagueness argument as a notice argument.

Finally, Petitioners' reliance on criminal law cases is misplaced (Petition at 17-18). In *Lankford v. Ohio*, 500 U.S. 110, 111, 126-28 (1991), for example, this Court held that a criminal sentencing process violated the petitioner's procedural due process rights because, "at the time of [his] sentencing hearing, he and his counsel [lacked] adequate notice that the judge might sentence him to death." Here, by contrast, Petitioners have never argued that, during the TLC administrative process, Padberg was unaware that his service refusal could trigger license revocation.

Thus, this Court should reject Petitioners' new procedural due process argument.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for a Writ of Certiorari.

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APPENDIX

STATUTORY PROVISIONS

New York Civil Rights Law

Article 4

Section 40-e. Innkeepers and carriers refusing to receive guests and passengers

A person, who, either on his own account or as agent or officer of a corporation, carries on business . . . as common carrier of passengers, and refuses, without just cause or excuse . . . to receive and carry any passenger, is guilty of a misdemeanor.

Administrative Code of the City of New York

Title 19

Chapter 5

Section 19-505(*l*)

The commission may, after a hearing, suspend or revoke any driver's license for failure to comply with any provision of this chapter applicable to licensed drivers or for failure to comply with the commission's rules and regulations.

Section 19-506 Regulations and enforcement.

a. Unless otherwise set forth herein the commission may impose reasonable fines, suspend or revoke any driver's license or vehicle license where the holder has failed to comply with or has willfully or knowingly violated any of the provisions of this chapter or a rule or regulation of the commission.

Section 19-507 Mandatory penalties.

e. The term "without justifiable grounds" used in paragraphs one and two of subdivision a of this section shall mean that standard of behavior which fails to conform to that of a reasonable and prudent person acting in compliance with any regulations promulgated by the commission.

Rules of the City of New York

Title 35

Chapter 2

Section 2-50 Refusals.

(b) A driver shall not refuse by words, gestures or any other means, without justifiable grounds set forth in §2-50(e) herein, to take any passenger to any destination within the City of New York, the counties of Westchester or Nassau or Newark Airport. This includes a person with a disability and any service animal accompanying such person.

Section 2-61 Compliance with Law.

(a)(2) A driver, while performing his duties and responsibilities as a taxicab driver, shall not commit or attempt to commit, alone or in concert with another, any willful act of omission or commission which is against the best interests of the public, although not specifically mentioned in these Rules.

Section 2-86 Penalties for Violation of Rules Governing Taxicab Drivers.

Rule No.	Penalty	Personal Appearance Required
2-61(a)(2)	$150 – 350 and/or suspension up to 30 days or revocation	Yes

Section 2-87 Penalties Mandated by Local Law.

(a)(1) Any driver who has been found to have violated a provision of §§2-34(a), 2-50(a), 2-50(b), 2-50(c) and 2-50(d) or any combination thereof, shall be fined not less than $200.00 nor more than $350.00. Any driver who has been found in violation of any of the provisions of such rules or any combination thereof, for a second time within a twenty-four-month period shall be fined not less than $350.00 nor more than $500.00, and the Commission may suspend the driver's license of such driver for a period not to exceed thirty days. The Commission shall revoke the driver's license of any driver who has been found to have violated any of the provisions of §§2-34(a), 2-50(a), 2-50(b), 2-50(c) and 2-50(d) or any combination thereof, three times within a thirty-six month period. Nothing contained herein shall limit or restrict any other authority the Commission may have to suspend or revoke a driver's license.

(c) The Commission shall not issue any license to any person, who has had his taxicab driver's license revoked pursuant to §§2-34(a), 2-50(a), 2-50(b), 2-50(c) and [*sic*] 2-50(d) for a period of one year from the date of such revocation.

Section 2-88 Additional Penalties.

Violation of any of these rules may also lead to revocation or suspension of a taxicab driver's license . . . .

Chapter 8

Section 8-03 Penalties.

(a) Whenever a respondent is charged with a violation of any Commission Rule or Administrative Code Section, he may be subject to civil penalties in accordance with the appropriate schedule of penalties set forth in the Commission Rules or the Administrative Code.

(b) In the alternative to any of the specific penalties set forth in the Commission Rules, the Commission may, in its discretion, impose a penalty of license revocation, license suspension of up to six (6) months and/or a fine . . . .

Section 8-14 Discretionary Revocation Proceedings.

(a) The Commission may institute proceedings to seek the revocation of any license for the violation of any Commission Rule, whether or not the penalty of revocation is provided therein.

(b) . . . . If the specific rule violation charged provides for the discretionary penalty of revocation, the proceeding shall be commenced before the Commission Adjudications Tribunal and heard by an ALJ [administrative law judge].

(c) The Commission shall notify the respondent of such proceeding by serving a written summons or notice detailing the charged misconduct and warning the respondent that a finding of guilt could result in the revocation of his license.

(d) Said written charges shall be served upon the respondent in accordance with Section 8-05, if the hearing is to be conducted before the Commission's Tribunal. . . . .

(e) Said charges shall inform the respondent of the location, date and time of any scheduled hearing.

(f) . . . . If the hearing is commenced at the Commission's Adjudications Tribunal, the procedures set forth in this Chapter shall apply. The affirmative defenses set forth in subdivision b of Section 19-512.1 of the Administrative Code may be available in any such hearing.

(h) If the proceeding is conducted by the Commission Adjudications Tribunal, the decision of the ALJ shall be a Recommended Decision to the Chairperson. In such case, the ALJ will prepare and submit to the Chairperson a Recommended Decision containing his findings of fact, conclusions of law and recommended penalties.

(i) Upon the issuance of a Recommended Decision in accordance with either subsection (g) or (h), containing findings of fact, conclusions of law and any recommended penalty, the respondent shall be provided with an opportunity to provide a written response to said Recommendation, limited to the record of the hearing and the determination of the ALJ with respect to penalty only.

(j) The Recommended Decision issued in accordance with either subsection (g) or (h), will be submitted for consideration to the Chairperson. The Chairperson shall consider any written comments submitted pursuant to subsection (i) and shall determine whether to accept, modify or reject the Recommendation of the ALJ.

(k) A final decision of an ALJ may be appealed to the Deputy Commissioner for Legal Affairs/General Counsel pursuant to the provisions of Section 8-13. The final decision of the Chairperson, affirming, modifying or rejecting the Recommendation of an ALJ rendered pursuant to this Section may be appealed to the TLC Comm[]issioners. The respondent may appeal the Chairperson's decision within thirty (30) calendar days of the date of the Chairperson's final decision by filing a written appeal, setting forth the basis for the appeal and all statements and arguments made in support thereof, with the Deputy Commissioner for Legal Affairs/General Counsel. The Chairperson may prescribe the form for the conduct and filing of such appeals. Review of the Chairperson's decision shall be limited to the issues of law raised in the appeal submitted, and whether the decision of the Chairperson and the recommended decision of the ALJ is supported by substantial evidence. The Commissioners may not review findings of fact or determinations of credibility by an ALJ. The Agency may submit a written response to any appeal received by the Deputy Commissioner for Legal Affairs/General Counsel. The respondent shall be afforded the opportunity to respond in writing to the Agency's written submission. The Commissioners shall receive a copy of the ALJ's Recommendation, the Chairperson's decision, the appeal, and any responses filed by the Commission

or the respondent. The Commission shall, by majority vote of the Commission at a meeting at which a quorum is present and in which it is acting in a quasi-judicial capacity, either affirm, modify, or reject the Chairperson's decision and penalty. The Chairperson shall not vote on such appeals. The results of the vote and action taken by the Commission shall be communicated at a public meeting. The Commission shall also have the authority, where appropriate, to remand the matter to the ALJ for further consideration prior to rendering a decision.

Supreme Court, U.S.
FILED
OCT 1 2003
OFFICE OF THE CLERK

No. 03-282

In the

Supreme Court of the United States

JOHN PADBERG, CLIFFORD PAOLILLO and RASHID AHMED, individually and on behalf of all others similarly situated,

Petitioners,

v.

DIANE MCGRATH-MCKECHNIE, RUDOLPH W. GIULIANI, JOSEPH MCKAY, MATTHEW DAUS, HARRY RUBINSTEIN, ELLIOT SANDER, HARVEY GIANNOULIS, MARVIN GREENBERG, RAMONA M. WHALEY and NEW YORK CITY TAXI AND LIMOUSINE COMMISSION,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF

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This case is about whether a city agency, in response to a single service refusal offense, may constitutionally revoke taxi drivers' licenses even though the governing statute states that the penalty for the violation, if proved, is a fine of "not less than two hundred dollars or more than three hundred and fifty dollars." In their Brief In Opposition, Respondents obfuscate the record and defend an illegal state policy as "merely unauthorized." In fact, hundreds of New York City taxi drivers have had their licenses revoked without legal basis or fair notice. Moreover, nothing in this Court's substantive due process jurisprudence excuses Respondents' actions as the right to be spared an illegal punishment is deeply rooted and "enshrined in our constitutional jurisprudence." *See BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574 (1996)

I. The TLC Has Admitted That Hundreds of Taxi Drivers Have Been Deprived of Their Licenses Because of Operation Refusal

First, Respondents attempt to minimize the scope of Operation Refusal and pretend that it may be limited to just a few taxi drivers, not untold hundreds. (*See* Brief in Opposition at 6, n.2) They even imply that this case involves only John Padberg, who is the putative class representative for all New York City taxi drivers affected either actually or potentially by the New York City Taxi and Limousine Commission's (the TLC) lawless reign. In fact, the record demonstrates that hundreds of drivers have been harmed.

On June 26, 2000, Peter Mazer, then deputy general counsel to the TLC (since promoted to general counsel) stated in an affidavit, part of the record on appeal, that between Nov. 11, 1999 and June 11, 2000, the TLC issued 156 summonses pursuant to Operation Refusal. On Nov

26, 2000, Respondents stated in interrogatories, also part of the record, that from Nov. 12, 1999 to Nov. 22, 2000, 254 taxicab drivers had been suspended pursuant to Operation Refusal. The policy continued for at least two years after that. Indeed, to this day, the TLC claims the right to revoke a taxi driver's license based on a single service refusal even though the governing statute clearly states that the penalty for a first service refusal is a fine "not less than two hundred dollars or more than three hundred and fifty dollars." N.Y.C. Admin. Code § 19-507 (b) (1989). Thus, it is fair to say that the named petitioners were among hundreds of tax drivers affected. Moreover, all 41,000 NYC taxi drivers live with the threat of revocaton. If these suspensions and revocations were unauthorized, that means that the taxicab drivers' property rights were taken without due process of law. *See BMW of North America, Inc. v. Gore*, 517 U.S. at 574 ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.")

It is true, and Petitioners "admit" as much, that Petitioners do not know precisely how many cabbies have been thrown out of work, how many have been suspended and how many have been revoked. But the respondents must know. For some reason they deliberately avoid informing this Court of the exact number, just as they avoided informing the district court and the court of appeals. Respondents also claim in their Brief In Opposition, that revoked drivers may seek reinstatement. Even if this assertion is true, it is nowhere in the record and nowhere in the TLC rules.

The attempts to confuse the facts are particularly unfortunate in a case where petitioners were not

permitted to take a single deposition. Nevertheless, the district court found that "[respondents] were acting pursuant to authority that they believed they possessed in order to further the legitimate interest of eliminating racial discrimination among taxicab drivers."

In fact, there is nothing in the record to indicate that this was Respondents' belief or their goal. It is certainly the case, however, that the TLC claimed the right to revoke licenses for service refusals (such as destination-based refusals) where alleged racial bias had nothing to do with it. *See* District Court opinion at A-32a-A33a ("Nevertheless, in practice Operation Refusal mandates summary suspensions for any kind of service refusal, whether it is race-based or not. The Operation Refusal Enforcement Directive says nothing about specifically targeting race-based refusals....")[1] There was no evidence that all, or even most, of the revocation cases in fact had a racial aspect. Respondents' sanctimony is especially misplaced when the evidence indicates not that the TLC acted "in response to passenger complaints" generally. *See* Brief in Opposition at 6. Operation Refusal was touched off by the widely publicized complaint of a single passenger, the movie star Danny Glover, which the Mayor and even the District Court acknowledged.[2] *See* District Court

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[1] There is also no proof or reason to believe that as a matter of practice the TLC tried especially hard to stop bias refusals as opposed to destination refusals (such as when a cab driver in Manhattan favors an airport fare or declines a trip to Queens). Certainly, the TLC never presented any such evidence either in this action or to the public.

[2] This is not to say that other passengers have not, quite legitimately, complained over time, or that public officials are not permitted to respond to public furor. But the actual facts undermine the idea that the TLC was responding to some newfound emergency, that it had no time to seek legislative authority for its

opinion at A-10a. Moreover, no motive, no matter how laudable, justifies disregarding the law.

II. Nothing In TLC Regulations Gave Taxi Drivers Notice of the TLC's Revocation Policy

Respondents suggest that New York City taxi drivers had notice of the prospect of revocation based on part of a TLC rule that provides that "[n]othing contained herein shall limit or restrict any other authority the Commission may have to suspend or revoke a driver's license." (Brief in Opposition at 22) Of course, this reading was rejected by the OATH courts and two state courts, that is by every independent court to consider the issue. Respondents ignore these decisions. But even if a taxicab driver had predicted such a strained interpretation, he would have been thrown off by the language of the statute, which states, in pertinent part, that a driver found in violation of the rule against service refusals "shall be fined not less than two hundred dollars nor more than three hundred fifty dollars for the first offense." A driver would have also been baffled by the fact that in announcing Operation Refusal, neither the Mayor, nor TLC officials, nor the press reports mentioned revocation—though they all mentioned summary suspensions. Not even Respondents claim that the new policy of charging alleged refusers also with "conduct contrary to the best interests of the public" was announced publicly. (Brief in Opposition at 6) These are the key facts that no one can deny.

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actions or to hold a vote of the full commission, or that it made some considered judgment about its own authority.

Sometime after their suspensions, the TLC did tell drivers like Mr. Padberg that their licenses might also be revoked. The OATH courts, of course, emphatically rejected this penalty as unauthorized by law. Though the courts below don't quarrel with the OATH courts' reasoned and indeed quite obvious conclusion of law, Respondents continue to insist they had this right based on a procedural rule that merely says the drivers should be granted a hearing.

Respondents attempt to place the constitutional bar lower and lower. For instance, they argue: "Indeed, Petitioners fail to cite any authority to support their view that ... the [New York City] Charter required the TLC Chairperson to submit the suspension and revocation policy to a full TLC Commission vote." (Brief in Opposition at 17) There is, of course, no direct case law, as the situation has not arisen before.

In the court of appeals, however, as Respondents know, Petitioners did cite several state decisions all of which demonstrate that for a commission to act lawfully, it needs a majority vote of its members. *Town of Smithtown v. Howell*, 31 N.Y. 2d 365, 339 N.Y.S. 2d 949 (1972) (failure to obtain 10 votes of 15 members fatal to attempted zoning change); *D.E.P. Resources, Inc. v. Planning Bd. of the Village of Monroe*, 131 A.D.2d 757, 516 N.Y.S.2d 954 (2d Dep't 1987) (three votes out of five-member board needed for board to act); *Rockland Woods, Inc. v. Incorporated Village of Suffern*, 40 A.D.2d 385, 340 N.Y.S.2d 573 (2d Dep't 1973) ("The purpose of the statute is to insure that before official action is taken by a public body, there must be clear and express authority by a majority of its members.") Petitioners did not cite these cases, or others cited below, in their Petition because the courts below did not decide the legality of the TLC policy. Instead they

waived this flouting of constitutional and democratic norms away as "arguably incorrect" (A-3a) or "merely 'incorrect' or 'ill-advised'" (A-35a). Tellingly, Respondents reduce the standard even further to "Merely Unauthorized." (Brief in Opposition at 18) At that point, petitioners cite "substantive due process" and their illegal acts are supposedly excused.

III. When A State Agency Deliberately and Lawlessly Took Petitioners' Licenses, That Action Violated Due Process

When a state policy is illegal—or "merely unauthorized"—and it deprives citizens of their property rights and their rights to work, the Constitution is offended. It is the case that not all state law violations are constitutional violations. If, for instance, the violation of state law is "random and unauthorized" and state law provides a remedy, a plaintiff may not invoke 42 U.S.C. § 1983. *E.g. Parratt v Taylor*, 451 U.S. 527 (1981). But where the state action is deliberate and in pursuit of an explicit policy and that policy is illicit, Section 1983 may be invoked.

Respondents note that Petitioners did not discuss *Interport Pilots Agency Inc. v. Sammis*, 14, F. 3d 133 (2d Cir. 1994), the one case on which the court of appeals relied. But even a cursory examination of that case actually demonstrates just how far the TLC strayed from constitutional standards.

In *Interport Pilots*, the Second Circuit considered the issuance by a New York State board of "notices which had the effect of discouraging [Long Island Sound] shippers" from hiring Connecticut shipping pilots. The Second Circuit found that the legal question – the construction of the Federal Boundary Waters Act -- was

one of first impression. 14 F.3d at 136. Examining the state law in detail, it found that the New York board's policy did violate the act. It noted, though, "No court or any other governmental authority had ever issued a binding interpretation of the law." *Id.* at 139. In other words, as with other substantive due process cases, the Connecticut pilots could point to no established right that had been disturbed.

The Second Circuit found further that the defendants had relied on a legal opinion by the New York Attorney General as well as the advice of counsel. *Id.* In this case, many courts have already ruled on the basic illegality of the TLC's conduct, and the TLC cannot point to a single before-the-fact legal opinion on which it relied or even considered. In *Interport Pilots*, the Second Circuit ruled based on a trial record that established the defendants' good faith. Here, the District Court relied solely on the assertions of TLC litigators. *Interport Pilots* rested in part on the conclusion that the board's actions were "essentially legislative rather than adjudicative [and] not subject to the notice and hearing requirements of the due process clause." *Id.* at 142. Here the action was not legislative – indeed that is part of the problem. Finally, the Connecticut pilots' licenses were neither suspended, nor revoked, though their business was allegedly disrupted. Here, the TLC has actively stripped drivers of their licenses – first summarily and then permanently – by executive decree and in clearly judicial (albeit lawless) proceedings.

Interport Pilots, like *Natale v. Town of Ridgefield*, 170 F.3d 258 (2d Cir. 1999), and the other zoning cases on which the district court relied, all rest on an "analysis [of] nature of the applicant's interest in the approval being sought, specifically whether the applicant has a

clear entitlement to the approval...." *Walz v. Town of Smithtown*, 46 F.3d 162, 168 (2d Cir. 1995). They are in line with this Court's decisions because they ultimately rest on whether the government action was arbitrary, as opposed to deliberate, and whether the plaintiffs could point to an established, as opposed to newfound, right. There is no question that the State of New York or the City of New York has the authority to legislate against service refusals and to penalize drivers. Had their actions been inadvertent, petitioners would certainly not be seeking relief here. But the actions were deliberate and pursuant to policy, yet in defiance of law. That law was enacted to define how (if at all) taxicab drivers might be punished, and it has been trampled. Even if respondents believed they were right—and there is no evidence they did—that is no defense. "The central aim of the Civil Rights Act was to provide protection to those persons wronged by the '[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *Owen v. City of Independence, Mo.* 445 U.S. 622, 650 (1980) (citing *Monroe v. Pape*, 365 U.S. 167, 184 (1961) quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)).

While not every state wrong can be remedied, where a city agency acts in defiance of law for political ends, nothing in this Court's jurisprudence suggests that respondents are immune from liability. The general idea that a state agency can only punish individuals in accordance with law is central not just to Section 1983, but to the law of damages, criminal law, and administrative law. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. __, 123 S.Ct. 1513 (2003) (punitive damages must be reasonable and within constitutional limits); *Apprendi v. New Jersey*, 530 U.S. 466, 481 (2000) (judges discretion in determining criminal penalties

circumscribed by law); *Securities and Exchange Comm'n v. Sloan* 436 U.S. 103, 112 (1978) (government may not take license to trade securities without lawful authority). In other words, the right is "fundamental" and "objectively 'deeply rooted in this Nation's history and tradition.'" *Washington v. Glucksberg*, 521 U. 701, 720-21 (1997) (Rehnquist, C.J.) (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977).

No effort to place this action in the "substantive due process" box should obscure the TLC's rampant lawlessness. Just as the TLC has no right to suspend a driver without a hearing, it should have no right, as Justice Rehnquist said in *Sloan*, to revoke his license without, an "unmistakable mandate." *Id.* at 113. Without such a mandate, without legal authority to revoke taxi drivers' licenses, the revocations are arbitrary and in violation of the Due Process Clause.

If anything in law is clear, it is that when the legislature has established a penalty for the violation of a rule—in this case, a fine of up to $350—the executive and administrative judges in their employ are limited by that penalty. Here, an executive agency has deliberately and continuously, as a matter of policy, violated the law that is supposed to govern it. Hundreds of taxi drivers have suffered tremendously as a result. This Court should grant the petition to enforce the law and the constitution and make it right.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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